United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

26-4

175

JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,550

PLAQUEMINES OIL AND GAS COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

On Petition for Review of Orders of the Federal Power Commission

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INDEX

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Pertinent Commission Docket Entries

Date *Proceedings*

1967

March 8—Application for Certificate of Public Convenience and Necessity filed by Plaquemines Oil and Gas Company, Inc.

March 16—Notice of Application issued

April 11—Petition to Intervene filed by the Brooklyn Union Gas Company

April 12—Petition to Intervene filed by the Public Service Commission of New York

1968—None

1969

March 21—Commission's Order Consolidating Proceedings, Permitting Intervention, and Fixing Date of Prehearing Conference, June 11-12

August 26—Presiding Examiner's Initial decision

1970

February 26—Commission's Opinion and Order Granting Certificates

March 30—New York Commission's Application for Rehearing

April 29—Commission's Opinion and Order denying Rehearing

May 28—Plaquemine's Oil and Gas Company Application for Rehearing with Reference to that Portion of Commission's Order of April 29, 1970 which directed Partial Refund

June 23—Commission's Opinion and Order Denying Rehearing

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Lawrence J. O'Connor, Jr., Carl E. Bagge, John A. Carver, Jr., and Albert B. Brooke, Jr.

Docket No. CP67-255

Delta Gas, Inc.

Docket No. CP67-256

Plaquemines Oil and Gas Company

Opinion No. 572

Opinon and Order Granting Certificates

(Issued February 26, 1970)

O'Connor, Commissioner:

1. Delta Gas, Inc., and the Plaquemines Oil and Gas Company are small, inter-related, family-owned companies doing business in the Mississippi Delta region of southern Louisiana. Plaquemines buys gas in Louisiana and sells it in Louisiana to the Tennessee Gas Pipeline Company. The gas it sells to Tennessee is transported to its delivery point by Delta, which operates a pipeline wholly within Louisiana. Pursuant to *California* v. *Lo-Vaca Gathering Company* (379 U.S. 366 (1965)), both Delta and Plaquemines applied for certificates of public convenience and necessity to permit them to continue these operations. There is no dispute that the gas sold by Plaquemines, and transported for its account to Tennessee's pipeline by Delta, is commingled with other Tennessee gas, a substantial portion of which is destined for resale in interstate commerce. The transportation and sale here in question thus fall squarely within Section 1(b) of the Natural Gas Act, as construed in *Lo-Vaca*. The Examiner concluded, and we agree, that the certificates applied for should be

granted. The public interest will be best served by the continuation of these services.

2. Certain other services by both companies are also within our jurisdiction and also require certificates. Turning first to Delta, the record shows that Delta's pipeline system consists of a North System of approximately 26 miles, and a wholly separate South System, which is somewhat shorter. A break of about two miles separates the two systems. On its South System, Delta buys gas from the United Gas Pipe Line Company, and it sells such gas to retail customers along the route. There is nothing in the record to suggest that the transportation performed by Delta on its South System is in interstate commerce. Because this is so, and because Delta's sales from the South System are not sales for resale, neither the transportation nor the sales conducted by Delta on its South System are within our jurisdiction.

3. On its North System, Delta buys gas from three sources: From the Shell Oil Company, from the Phillips Petroleum Company, and from its affiliate, Plaquemines. It sells gas to retail and industrial customers along its route, to the Louisiana Power and Light Co., and to Plaquemines. Because the gas purchased from these three sources is transported on Delta's North System and there commingled with the gas sold by Plaquemines to Tennessee, we agree with the Examiner that such transportation by Delta is, pursuant to *Lo-Vaca,* jurisdictional. We further conclude, however, that although the transportation performed by Delta on the North System is jurisdictional, its sales from the North System, to the extent that they are not sales for resale, are not. The record indicates that gas sold to the Louisiana Power & Light Co. is used for plant operation and is not resold, and such sales, therefore, are outside our jurisdiction. Delta's other sales to retail and industrial customers are also not sales for resale. If sales for resale are not involved, *Louisiana Public Service Commission* v. *F.P.C.,* (359 F. 2d 525 (1966)), does not ap-

ply and our jurisdiction does not attach. But Delta's sales to Plaquemines, which are sales for resale, are jurisdictional.

4. Turning, secondly, to Plaquemines, the record shows that Plaquemines buys gas from three sources: From the Woods Oil and Gas Company, from the Humble Oil & Refining Company, and from its affiliate, Delta. Plaquemines owns no transportation facilities. Almost all of the gas purchased by it is sold to Tennessee, but it effects some sales to the Shell Pipe Line Corporation and to Delta. We have stated above that Plaquemines' sales to Tennessee, and Delta's transportation for Plaquemines' account of the gas so sold, are both within our jurisdiction. Further, because all of the gas purchased by Plaquemines from all of its sources is transported for it by Delta on the North System, there to be commingled with gas sold to Tennessee, the transportation by Delta of all other Plaquemines' gas is also, under *Lo-Vaca* jurisdictional. As to Plaquemines' sales to Delta and to Shell, the former (because they are sales for resale) are within our jurisdiction and require certification. Gas sold to Shell, on the other hand, is not resold. The record indicates that it is used to pump liquids at Shell's refinery at Baton Rouge. Accordingly, Plaquemines' sales to Shell are not within our jurisdiction.

5. In summary, we conclude that certificates are required for all of Delta's transportation on its North System, for Delta's sales to Plaquemines, and for Plaquemines' sales to Delta and to Tennessee.

6. While the case before us constitutes a certificate proceeding, and the record consequently does not contain the full cost evidence necessary to a rate case, the record is sufficient to permit us to reach certain conclusions as to price. We believe that the Examiner erred in his conclusions on this point. In considering the appropriateness of Plaquemines' sale price to Tennessee, he disallowed all elements of cost except the cost of gas purchased by Plaque-

mines (17.5 cents per Mcf) and the transportation charge paid by Plaquemines to Delta (1.5 cents per Mcf). But in our judgment, Plaquemines is, as a pipeline applicant before us, entitled to its legitimate costs of service, in the same manner as any other pipeline company.

7. The hearings in this case elicited testimony from two witnesses only, both of whom appeared on behalf of the applicants. They presented cost-of-service information which disclosed, among other things, the 1968 experience of each of the applicants in connection with sales to Tennessee. Upon a careful examination of the whole record, we are persuaded that these costs-of-service were not effectively challenged; that each of the cost elements represents a legitimate cost; that none was excessive in amount; and that, without permitting in any particular the duplication of costs between Delta and Plaquemines, the price of 21.5 cents per Mcf, for which Plaquemines may now contractually file, has been justified and represents a price which is warranted by the public convenience and necessity. However, until Plaquemines makes appropriate filing for an increase in its rates to that level, the rate to be charged Tennessee shall continue to be 20.5 cents per Mcf.

Because the issues have been argued adequately in the briefs, we are denying oral argument.

The Commission further finds:

(1) The Applicants, Delta Gas, Inc., Docket No. CP67-255, and Plaquemines Oil and Gas Company, Docket No. CP67-256, are natural gas companies within the meaning of the Natural Gas Act, each having its principal place of business at Buras, Louisiana.

(2) The sale of natural gas by Plaquemines to Tennessee, as applied for, is a sale for resale of natural gas in interstate commerce, subject to the jurisdiction of the Federal Power Commission pursuant to the provisions of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(3) The transportation of natural gas by Delta for and on account of Plaquemines for resale to Tennessee, as applied for, is subject to the jurisdiction of the Federal Power Commission, and such transportation is subject to the requirements of subsection (c) and (e) of Section 7 of the Natural Gas Act.

(4) The sale and transportation of natural gas, as applied for, by Plaquemines and by Delta and the operation of the facilities in conjunction therewith are required by the public convenience and necessity and certificates therefor should be granted.

(5) The Applicants are able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Natural Gas Act and the requirements, rules, and regulations of the Commission thereunder.

(6) The public convenience and necessity require that the certificates issued herein, and the rights granted hereunder are conditioned upon the Applicants' compliance with all applicable Commission Regulations under the Natural Gas Act, and particularly the general terms and conditions set forth in paragraphs (a), (e), (f), and (g) of Section 157.20 of such regulations.

(7) Sales of natural gas by Plaquemines to Delta, the transportation of natural gas by Delta on its North System pipeline, and sales for resale by Delta of natural gas from its North System pipeline are subject to the jurisdiction of the Federal Power Commission, and such sales and transportation are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

The Commission orders:

(A) A certificate of public convenience and necessity is hereby issued, upon the terms and conditions of this order, to Delta Gas, Inc., Docket No. CP-67255, for the transporta-

tion of natural gas in interstate commerce for and on account of the Plaquemines Oil and Gas Company.

(B) A certificate of public convenience and necessity is hereby issued, upon the terms and conditions of this order, to Plaquemines Oil and Gas Company, Docket No. CP67-256, for the sale of natural gas in interstate commerce to the Tennessee Gas Pipeline Company.

(C) The certificates issued by paragraphs (A) and (B) above and the rights granted thereunder are conditioned upon the Applicants' compliance with all applicable Commission Regulations under the Natural Gas Act and particularly the general terms and conditions set forth in paragraphs (a), (e), (f), and (g) of Section 157.20 of such Regulations.

(D) Within 60 days after issuance of this order Plaquemines shall file an application for a certificate of public convenience and necessity, pursuant to Section 7(c) of the Natural Gas Act, for authority to continue its sales of natural gas to Delta.

(E) Within 60 days after issuance of this order, Delta shall file an application for a certificate of public convenience and necessity, pursuant to Section 7(c) of the Natural Gas Act, for authority to continue its sales of natural gas for resale on its North System pipeline and to continue its transportation of gas on its North System pipeline.

(F) The decision of the Presiding Examiner on August 26, 1969, is adopted as the decision of the Commission to the extent not inconsistent herewith.

(G) All exceptions not granted are denied.

(H) Oral argument is denied.

By the Commission.

(SEAL)

GORDON M. GRANT,
Secretary.

Application for Rehearing of New York Commission

Pursuant to the provisions of Section 19 of the Natural Gas Act, the Public Service Commission of the State of New York applies for rehearing of the Commission's Opinion and Order issued herein on February 26, 1970, and designated as Opinion No. 572. We submit that the Commission's opinion is legally defective on two separate grounds, as set forth below.

I. *There Is No Credible Evidence to Support Plaquemines' Claim That Its Transportation Costs Exceed 1.5 Cents Per Mcf.*

The evidence is undisputed that Plaquemines, which purchases gas from Woods and Humble in the Potash Field at a price of 17.02¢ per Mcf (scheduled to escalate to 17.5¢ subsequent to the conclusion of hearings), pays to its affiliate, Delta, a fee of 1.5¢ per Mcf to transport the gas from Potash to Nairn, a distance of 9.4 miles, where the gas is resold to Tennessee Gas Pipeline Company. The cost-of-service issue in this case, therefore, is whether Plaquemines is entitled to any increment over and above this 1.5¢ charge for its services to Tennessee.

It is true, as the Commission states, that the applicants presented two witnesses in support of a cost of service for Plaquemines in excess of 4¢ per Mfc; however, as found by both the FPC Staff Counsel and the Examiner—each of whom, unlike the Commission, had an opportunity to observe the witnesses under cross-examination—the testimony of the witnesses was woefully inadequate under any legally acceptable standard. Thus, for example, the substantial sum paid to Mrs. Pottharst was totally unsupported by any indication of the services, if any, performed by Mrs. Pottharst on behalf of Plaquemines, or the necessity for such services (see, e.g., Tr. 93, 186-87). Similarly, although the applicants' presentation allocated the entire cost of Delta's Potash-Nairn line to the sale to Tennessee, the witnesses were unable to indicate the capacity of the line (Tr. 180). And, most important of all, the Examiner was

clearly entitled to give little or no weight to the cost-of-service theories of the witnesses in light of their evasive and uninformed answers on cross-examination (see, e.g., Tr. 66-70, 93-99, 161, 166-69, 171-74, 176-77, 180, 183-86, 188, 193-94). While the Commmission undoubtedly has considerable expertise in many areas, it is difficult to understand how the Commission can, on the basis of the cold record, substitute its evaluation of the witnesses' credibility for that of the Presiding Examiner.

II. *All Increases Collected by Plaquemines Above Its 18¢ Initial Price Are Null and Void and Must Be Refunded*

Plaquemines commenced its jurisdictional sale to Tennessee in 1956 at an initial rate of 18¢ per Mcf, and thereafter increased its rate to 20.5¢ per Mcf without following the rate-change procedure required by Section 4(d) of the Natural Gas Act.

Under these circumstances, there can be no question (1) that the several rate increases collected by Plaquemines subsequent to the commencement of initial deliveries were void *ab initio,* (2) that, as a result, the certificate to be issued to Plaquemine here must be conditioned to the initial price of 18¢ specified in the Plaquemines-Tennessee contract, leaving Plaquemines free to file under Section 4(d) for any contractual increase to which it may be entitled, and (3) that Plaquemines must be required to refund, with appropriate interest, the full amount of the illegal increases which it has collected from Tennessee.

It is, of course, well-established law that

> "any rate changes provided for in the contract, whether by virtue of a 'favored nations' or 'escalation' clause or otherwise, constitute rate changes under the Natural Gas Act and are forbidden in the absence of compliance with the filing provisions of the Act and the regulations of the Commission." *Socony Mobil Oil Co.* v. *The Brooklyn Union Gas Co.,* 299 F.2d 692 at 694 (5th Cir. 1962), *cert. denied,* 371 U.S. 887.

Accord, *City of Colton* v. *Southern California Edison Co.*, Op. 346, 26 FPC 223 at 232-33 (1961), *aff'd, F.P.C.* v. *Southern California Edison Co.*, 376 U.S. 205 (1964); *Shell Oil Co.* v. *F.P.C.*, 334 F.2d 1002 at 1009-10, 1014 (3rd Cir. 1964); *First Transportation Gas Corp., Inc.* v. *Michigan Wisconsin Pipe Line Co.*, RI69-812, Oct. 29, 1969, and cases there cited; see also *Niagara Mohawk Power Corp.*, Op. 481, 34 PFC 1298 at 1300-02 (1965), *aff'd Niagara Mohawk Power Corp.* v. *F.P.C.*, 379 F.2d 153 (D.C. Cir. 1967); *Bangor Hydro-Electric Co.* v. *F.P.C.*, 355 F.2d 13 (1st Cir. 1966); *Central Maine Power Co.* v. *F.P.C.*, 435 F.2d 875 (1st Cir. 1965).

In light of this clear and consistent precedent, cited in part and relied on by the Examiner (Ex. Dec. 10, 11), it is surprising, to say the least, that the Commission has, without offering any rationale or even any discussion, simply assumed that Plaquemines' contractual increase from 18¢ to 20.5¢ somehow became legally effective despite Plaquemines' total failure to comply with the filing requirements of Section 4 of the Natural Gas Act.

Wherefore, the Public Service Commission of the State of New York respectfully requests the Commission to grant rehearing of Opinion No. 572, and, upon rehearing, to vacate said Opinion and affirm the Examiner's Decision, modified as requested by Staff Counsel.

Respectfully submitted,

Public Service Commission
of the State of New York

By ________________

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March 30, 1970

Opinion No. 572-A

Opinion and Order Denying Rehearing

(Issued April 29, 1970)

O'Connor, Commissioner:

The Public Service Commission of the State of New York on March 30, 1970, filed an application for rehearing of the Commission's Opinion and Order No. 572 issued February 26, 1970. In that Opinion and Order, we found that certificates of public convenience and necessity should be granted to the Plaquemines Oil and Gas Company for its sales to the Tennessee Gas Pipeline Company, and to Delta Gas, Inc., for the transportation services performed by Delta for Plaquemines in connection with such sales. We further found that certain other sales and services by Delta and Plaquemines are jurisdictional, and we ordered the companies to apply for appropriate certificates. We stated that the record showed that the public convenience and necessity warrant a charge by Plaquemines to Tennessee of 21.5 cents per Mcf, but that until a suitable filing for the increase is made, the current charge of 20.5 cents per Mcf must continue.

The New York Commission contends, first, that there is no credible evidence to support Plaquemines' claim that its transportation costs exceed 1.5 cents per Mcf, and that this is the cost-of-service issue in this case. We think otherwise. As to the 1.5-cent charge, the record shows (particularly in Exhibit 3), that Delta's transportation costs for the Plaquemines sales to Tennessee significantly exceed the 1.5-cent transportation charge now paid by Plaquemines to Delta pursuant to their contract. As to the cost-of-service issue, in our view the important issue is whether the charge of 20.5 cents per Mcf, now charged Tennessee by Plaquemines, and on file with this Commission, is justified. As we stated in our Opinion, this case was commenced as a certificate proceeding, and the record therefore does not contain the full cost evidence normally included in a rate case. Never-

theless, the cost evidence as presented in the record is sufficient to permit us to conclude, as we did and as we now confirm, that the current 20.5-cent rate is justified.

Plaquemines is a small, family-owned company which purchases gas from several sources and sells gas to several buyers. The bulk of its sales are to Tennessee, pursuant to a 1956 contract. The Tennessee gas is transported and delivered to Tennessee for Plaquemines' account by Delta. In connection with its sales to Tennessee, the record shows that Plaquemines incurred costs of $500,662 in 1968 in selling 2,402,698 Mcf of gas to Tennessee. The revenue from those sales did not match Plaquemines' costs:

Gas Purchases	$421,576
Pipeline Transportation Charges	36,123
Officers' Salaries	22,344
Other Salaries and Wages	5,575
Other Expenses	15,044
Total	$500,662
Revenues	492,553
Revenue Excess or (Deficiency)	(8,109)

As we stated in our Opinion, our examination of the whole record persuaded us that this cost-of-service was not effectively challenged. Our examination led us to conclude and we confirm that conclusion now, that the price of 20.5 cents per Mcf, which Plaquemines is currently charging Tennessee is a price which is consistent with the public interest.

The figures set forth above show revenues based upon sales at 20.5 cents per Mcf. The unit cost is 20.8 cents per Mcf. While certain elements of the Plaquemines cost-of-service have been questioned, we cannot find a sufficient basis in the record for excluding any portion of them. Each in our opinion is legitimate; none is excessive. For example, notwithstanding the New York Commission's asser-

tions to the contrary, there is in fact evidence in the record that the President of Plaquemines performs services in return for her salary (see, *e.g.*, Tr. pp. 93, 199). That salary does not appear inordinate, in light of the magnitude of the company's business. In sum, we believe that the costs detailed above are sufficiently supported in the record.

As noted above, our Opinion No. 572 states further that a charge by Plaquemines to Tennessee of 21.5 cents per Mcf, for which Plaquemines may now contractually file, appears in our judgment to be warranted. By so stating, it was not our intention to preclude a challenge to that price, at such time as Plaquemines may file for it.

Plaquemines' principal source of gas for its sales to Tennessee is the Humble Oil & Refining Company, whose sale price per Mcf rose 1 cent in 1969 as indicated in the record (see our order of June 6, 1969). In light of the proportion of Plaquemines' purchases from Humble, in relation to its total purchases, that known and proven increase in its cost of gas raises its unit cost for sales to Tennessee from 20.8 cents to approximately 21.5 cents per Mcf. Moreover, the record shows conclusively that Woods' and Humble's reserves are declining, as are their sales to Plaquemines. Plaquemines' unit cost, in these circumstances, may reasonably be expected to rise. In short, on the basis of the record before us, we believe 21.5 cents per Mcf to be justified.

The New York Commission states that the applicants' witnesses were "evasive", "uninformed", and "woefully inadequate", and that we should therefore defer not to "the cold record" but to the evaluation of the witnesses' credibility by the Examiner and the Staff Counsel. In this case, as always, we have considered the findings of the Examiner and the position of Staff Counsel, and indeed all counsel, but we have drawn our conclusions from the record.

The New York Commission asserts, secondly, that all amounts collected by Plaquemines in excess of its initial

(1956) rate of 18 cents per Mcf are null and void and must be refunded, because none of the increases was the subject of a rate-change filing under section 4(d) of the Natural Gas Act. The New York Commission cites extensive authority in support of the proposition that a rate increase, pursuant to a contract escalation provision, is without effect in the absence of compliance with section 4(d). We agree with that proposition, but our agreement does not lead us to accept the New York Commission's conclusion.

In our view, Plaquemines may reasonably be excused from its failure to seek a certificate from us, and to file its rate, prior to our own decision in *Lo-Vaca Gathering Company*, 26 FPC 606 (1961). As we have observed in connection with independent producers, "the doctrine of that case may not have been predictable . . . The Producers might have felt, with some reason, that gas could have been isolated from the jurisdictional gas by contractual means". *Hugoton Production Company*, 41 FPC 490 (1969). The record indicates that Plaquemines did seek "by contractual means" to keep its sales to Tennessee from coming within our jurisdiction. We have in this situation refrained "as a matter of equity" from requiring refunds for periods prior to 1961, and we do so here. See also *George Despot, et al.*, Docket Nos. CI65-974.

The record before us is virtually devoid of 1961 cost information. In these circumstances, we take notice of the then existing in-line price for on-shore independent gas producers in Southern Louisiana. That price in 1961 was 20 cents per Mcf. *Union Texas Petroleum*, 32 FPC 254 (1964). While Plaquemines is a pipeline, and not a producer, we think it reasonable, in light of the then in-line price and the minimal size and impact of the sale here involved, to conclude that if Plaquemines had in 1961 filed with us its then current price of 19.5 cents per Mcf for sales to Tennessee, we would have found the rate acceptable. In any event, the cost to the Commission and to the parties

of attempting to reconstruct, at a new hearing now, what the Commission might have done in 1961, would almost certainly outweigh any benefits to be gained thereby.

However, we cannot excuse Plaquemines from its failure to file the tariff increase to 20.5 cents per Mcf when such rate became effective, pursuant to Plaquemines' contract with Tennessee, on November 1, 1964. As the New York Commission points out, it is clear that a rate change pursuant to a contract escalation provision is forbidden in the absence of compliance with the filing provisions of the Act. *Socony Mobil Oil Co.* v. *The Brooklyn Union Gas Co.*, 299 F. 2d 692 (1962); *Shell Oil Co.* v. *F.P.C.*, 334 F. 2d 1002 (1964). From that date until the date Plaquemines did seek to file with us, on June 27, 1966, Plaquemines should be required to refund to Tennessee 1 cent per Mcf for the gas sold to Tennessee.[1]

On June 27, 1966, Plaquemines filed with us an application for a certificate of public convenience and necessity as an independent producer. In its application, Plaquemines set forth its then current 20.5-cent sale price to Tennessee. We subsequently advised Plaquemines that it ought instead to file as a pipeline (and this it later did, again filing its 20.5-cent rate), but we cannot fault Plaquemines for applying initially as an independent producer. It did so because this Commission had, following the Supreme Court's *Lo-Vaca* decision in 1965 (379 U.S. 366), implied to Plaquemines that it should so file. In the circumstances, we think it correct to view June 27, 1966, as the date Plaquemines first filed with us.

Although the record before us falls far short of containing the definitive cost information which is important in

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1 While the June 27, 1966, filing was a certificate application rather than an increased rate filing as such, we believe that that filing may, in the present circumstances, appropriately be treated as if it had been a rate increase filing. Therefore the appropriate notice period of 30 days and a one day suspension will be used to determine the effective date of the 20.5¢ rate, *i.e.*, July 29, 1966.

this kind of case, the record does contain some cost data with respect to the years 1965, 1966, and 1967. By taking all of that data into account, as well as the 1968 data discussed above, we conclude that the 20.5-cent price on and after July 29, 1966, is justified, and that refunds on and after that date are not required.

In summary, then, we conclude that Plaquemines may be excused from its failure to file with us prior to 1961; that its price from 1961 until escalation in 1964 was justified by the public convenience and necessity; that its 1-cent escalation in price from the contract escalation date in 1964 until the June 1966 filing was in excess of what the law permits, and must therefore result in refunds of 1 cent per Mcf for sales to Tennessee during that period; and that the record supports a finding that 20.5 cents per Mcf is warranted on and after July 29, 1966.

The Commission further finds:

(1) Plaquemines shall be required to refund to Tennessee 1 cent per Mcf for natural gas sold by Plaquemines to Tennessee during the period beginning November 1, 1964, and ending July 28, 1966, but Plaquemines shall retain such amounts required to be refunded pending further orders of the Commission.

(2) In all other respect the assignments of error and grounds for rehearing as set forth in the application for rehearing filed by the Public Service Commission of the State of New York present no facts or legal principles which would warrant any further modification of Opinion No. 572 and the accompanying order.

The Commission orders:

(A) Plaquemines shall refund to Tennessee 1 cent per Mcf for natural gas sold by Plaquemines to Tennessee during period beginning November 1, 1964, and ending July 28, 1966, but it shall retain such amounts as are hereby re-

quired to be refunded, pending further orders of the Commission.

(B) The application for rehearing filed by the Public Service Commission of the State of New York is otherwise denied.

By the Commission.
(SEAL)

GORDON M. GRANT,
Secretary.

Application for Rehearing and Reconsideration of Plaquemines Oil and Gas Company, Inc. With Reference to That Portion of the Commission's Order of April 29, 1970 Which Directs a Partial Refund

Pursuant to the provisions of Section 19 of the Natural Gas Act (15 U.S.C. § 717r), Plaquemines Oil and Gas Company, Inc. (Plaquemines), a party aggrieved by that portion of the Commission's Opinion and Order of April 29, 1970, designated Opinion No. 572-A, which directed Plaquemines to refund 1 cent per mcf for natural gas sold by Plaquemines to Tennessee Gas Pipeline Company (Tennessee) during the period beginning November 1, 1964 and ending July 28, 1966, hereby applies for rehearing and reconsideration with reference to that portion of said Order only, and in support of said application Plaquemines sets forth the following grounds:

1. As the Commission recognized in its two Opinions in this case, Plaquemines and its affiliate, Delta Gas, Inc. (Delta), are two very small, family-owned companies which, over the years, have sold natural gas to several buyers, all such sales being made entirely within the State of Louisiana.

2. Regarding Delta's gas sales, the Commission held in its Opinion No. 572 of February 26, 1970, that none of the sales made by Delta on its North System are subject to

the Commission's jurisdiction; that Delta's sales to Louisiana Power & Light Company are "outside our jurisdiction"; and that likewise Delta's other sales to retail and industrial customers are not sales for resale . . . and our jurisdiction does not attach". Accordingly, the Commission concluded that, out of all of its sales activities, only Delta's sales to its own affiliate, Plaquemines, which are sales for resale, are subject to the Commission's jurisdiction.

3. Regarding Plaquemines' sales, the Commission held in its Opinion No. 572 that its sales to Shell Pipe Line Corporation for use in the latter's refinery in Baton Rouge, Louisiana, are also not subject to the Commission's jurisdiction. Thus, like Delta, part of Plaquemines' sales activities are totally exempt from the requirements of the Natural Gas Act. But, because of the thrust of the Supreme Court's 1965 decision in *California* v. *Lo Vaca Gathering Company,* 379 U.S. 366, the Commission ruled that Plaquemines' sales within the State of Louisiana to Tennessee Gas Pipeline Company are subject to the Act and that same are therefore jurisdictional.

4. Accordingly, from the very outset, these cases present the distressing situation which confronts a small family-operated natural gas company when it has to proceed, without the day-to-day advice of a competent natural gas legal specialist or expert, to determine what, if anything, it is required to do under the Natural Gas Act when all of its sales are made exclusively within the confines of one State to several different customers. Indeed, as the Commission has recognized, until the Supreme Court's decision in *Lo Vaca* in 1965, even the most experienced experts in natural gas law and regulation seriously differed as to whether sales such as Delta's to Plaquemines and Plaquemines' to Tennessee were fully subject to the Commission's jurisdiction under the Act. Consequently, as the record shows, it was not until April 14, *1966, after the Supreme*

Court's decision in Lo Vaca, that the Commission itself first approached Plaquemines and requested it to submit appropriate certificate and rate filings.

5. The Commission thus correctly concluded in its Opinion No. 572-A that, under these circumstances, "Plaquemines may reasonably be excused from its failure to seek a certificate from us, and to file its rate" prior to the decision in *Lo Vaca*. But, inexplicably, the Commission extended this very reasonable ruling *only through 1961,* when it (the Commission) rendered its own decision in *Lo Vaca. In truth and in fact, however, the* Lo Vaca *decision did not become final and absolute* UNTIL *1965, when the Supreme Court rendered its final opinion, reported at 379 U.S. 366 (1965).* Thus, during the period from 1961 until 1965, when the Supreme Court acted, *Lo Vaca* was in the process of appeal and it was not yet the law of the land. In justice, therefore, we urge the Commission, first of all, to reconsider its application of the aforementioned "rule of reason" in this case and to extend it (under the circumstances presented here) to that date in 1966 when, for the very first time after the Supreme Court's decision in *Lo Vaca,* the Commission itself asserted its jurisdiction and authority under the Act and requested Plaquemines to submit appropriate rate filings and certificate applications to the Commission, which, of course, Plaquemines promptly submitted.

6. We urge further that until the Supreme Court rendered its decision in 1965 and the Commission actually asserted its authority over Plaquemines in 1966, Plaquemines' failure to make any rate filings are clearly understandable and excusable in equity. Section 2 of the Natural Gas Act (15 U.S.C. § 717a) defines a *"Natural Gas Company"* as a person engaged in the transportation of natural gas in *interstate commerce,* or the sale *in interstate commerce* of such gas for resale"; and, of course, Section 4(d) of the Act (15 U.S.C. § 717c(d)) is limited to "natural gas companies", as defined in the Act itself, and it prescribes:

"Unless the Commission otherwise orders, no change shall be made by *any natural-gas company* in any . . . rate . . . except after thirty days' notice to the Commission and to the public." Until 1966, when the Commission first exercised its newly-defined authority under *Lo Vaca* and actually requested Plaquemines to file, Plaquemines, *limited entirely to sales within Louisiana,* some of which the Commission has now recognized to be non-jurisdictional, was at the very least in a *bona fide,* debatable position regarding the question of whether it was, in fact and in law, a *"natural gas company"* engaged *in interstate commerce,* and thus strictly required by the federal Act to file its rate to Tennessee with the Commission. There was nothing in *Lo Vaca* which absolutely settled Plaquemines' standing under the Act and, of course, Plaquemines was in no respect directly bound by the decision in *Lo Vaca.* Hence, it was not until April 1966, when the Commission itself decided to ask Plaquemines to file its rates, that Plaquemines was on notice for the first time that the Commission henceforth intended to regulate whatever portions of Plaquemines' sales caused it to be a natural gas company, as defined by the Act.

7. Under these circumstances, we submit that the rule and the decisions the Commission relied upon in its, Opinion No. 572-A to conclude that Plaquemines should be required to make a partial refund to Tennessee are not really applicable to this case at all. The rule, of course, that no natural gas company, *already clearly subject to the Act,* may increase its rate without first complying with the filing provisions of the Act, is beyond dispute. *But here, when Plaquemines' rate to Tennessee was automatically increased in 1964, under long standing provisions of its 1956 contract, the Lo Vaca case was still pending before the Supreme Court of the United States and the Commission had never theretofore asserted any jurisdiction over Plaquemines' sales to Tennessee under the 1956 contract.* In 1964, there-

fore, Plaquemines was *not "clearly a natural gas company subject to the Act"* as were Shell Oil Company in *Shell Oil Co.* v. *F.P.C.*, 334 F.2d 1002 and Socony Mobil Oil Company in *Socony Mobil Oil Co.* v. *The Brooklyn Union Gas Co.*, 299 F.2d 692—the two cases the Commission unfortunately construed to require a refund here. In *Shell Oil Co.*, for example, Shell, a natural gas company already *holding a certificate under the Natural Gas Act,* actually filed a "change in rate" schedule with the Commission to cover a proposed rate increase. That increase was protested by El Paso Natural Gas Company and it was suspended by the Commission, which ordered that a hearing be held. Later on, the suspension ended and the rate increase was collected by Shell, subject to refund. Ultimately, the proposed increase was rejected by the Commission as unjustified. In the meantime, however, Shell and El Paso negotiated a compromise which established another rate to become effective January 1, 1960. No rate filing was made by Shell until March 31, 1961, 15 months after the compromise increased rate became effective. Obviously, under those conditions, the Commission and the Third Circuit Court of Appeals properly held, under Section 4 (d) of the Act, that a rate increase put into effect by a certificated natural gas company without proper filing is improper and subject to refund. Shell, knowing it was fully subject to the Act, collected an increased rate before it filed under Section 4 (d).

Here, however, when Plaquemines' rate to Tennessee was automatically increased under the 1956 contract in 1964, *Plaquemines cannot fairly be charged with knowledge that it was (like Shell) subject to the Act,* because in 1964 *Lo Vaca* was still pending in the Supreme Court and the Commission had not taken action to extend its new *Lo Vaca* jurisdiction to Plaquemines

8. In addition to the foregoing, we submit there are other even stronger reasons why it is extremely unfair and un-

lawful for the Commission to subject Plaquemines to any refund order in this case. The Act itself, at Section 4 (a) (15 U.S.C. § 717c), directs simply that "All rates . . . made . . . for . . . the sale of natural gas subject to the jurisdiction of the Commission . . . shall be *just and reasonable.*" The Act then goes on to define an *"unlawful"* rate as one that "is *not* just and reasonable".

Section 4(e) of the Act then provides that, in the case of proposed increased rates, the Commission shall order refunds only when it finds they are *"not justified"*—i.e., they are *"not just and reasonable"*.

Here, the Commission has now absolutely ruled (in its Opinions Nos. 572 and 572-A) that in 1961 the "existing in-line price for on-shore independent gas producers in Southern Louisiana was 20¢ per mcf" (See also *Union Texas Petroleum,* 32 F.P.C. 254 (1964)); that "if Plaquemines had in 1961 filed with us its then current price of 19.5 cents per mcf for sales to Tennessee, *we would have found the rate acceptable"*; that the 20.5 cent price on and after July 29, 1966, *"is justified"*; that Plaquemines' and Delta's "cost-of-service were not effectively challenged" at the hearing before the Examiner; that *"each of the cost elements represents a legitimate cost"*; that *"none was excessive in amount"*; and finally that Plaquemines' pending rate increase to 21.5¢ per mcf "has been justified and represents a price which is warranted by the public convenience and necessity."

Hence, there has been *no* finding that any of Plaquemines' rates, past, present or proposed, are either unjust or unreasonable or that any have been "unlawful" (as that term is defined in Section 4(a) of the Act). Indeed, the Commission has ruled that, as early as 1961, the "in-line price" in Southern Louisiana was 20¢ per mcf, whereas the price increase allowed to Plaquemines by the 1956 contract *three years later, in 1964,* was only 20.5¢ per mcf.

In circumstances such as these, therefore, leaving aside the question of whether or not the Commission may *lawfully* order a refund under Section 4 (e) of the Act, it is simply grossly inequitable, unjust and unreasonable for the Commission to do so, and of course it has repeatedly been held that, in cases of this nature, the Commission is not obligated to follow any single course of action to determine what is just and reasonable or desirable in the area of rate regulation and rate refunds. (*Wisconsin* v. *Federal Power Commission*, 373 U.S. 307, 309 (1963); *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591.)

In *Federal Power Commission* v. *Hope Natural Gas Co., supra,* the Supreme Court stated the rule as follows at 320 U.S. 602, 603:

> "We held in Federal Power Commission v. Natural Gas Pipeline Co., supra, that the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its . . . function, moreover, involves the making of 'pragmatic adjustments'. . . . And when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act. . . . Under the statutory standard of just and reasonable, it is the result reached not the method employed which is controlling. . . . It is not theory but the impact of the rate order which counts."

In the instant case, we can find nothing in the Act itself which requires or authorizes the Commission, in the face of a finding that the rates presented are just and reasonable, suddenly to resort to a refund procedure solely because a rate filing was not timely made and because, when the rate was made effective, the company involved had honest reason to believe it either *was not* or *might not* be subject to the certificate and rate filing requirements

of the Act. And, lacking any such requirement in the statute itself, we urge the Commission to follow the teaching of the aforementioned Supreme Court decisions and thereby fashion an order which eliminates the very oppressive, unjust refund requirements of Opinion No. 572-A.

9. In fact, since the Commission has already ruled that Plaquemines' rates during the period in question were "just and reasonable" and thus "lawful" under the provisions of Section 4 (a) of the Act, the confiscatory refund assessed in Opinion No. 572-A must be construed as nothing but a *"penalty"* or a *"fine"* for Plaquemines' failure to file in 1964; and in such cases it is clear that the Commission is wholly without authority to order fines, penalties or reparations (*Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9, 24, 25; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618; *Montana-Dakota Utility Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 254). Indeed, in *F.P.C.* v. *Sunray DX Oil Co., supra*, the Supreme Court stated, at page 24:

> "It would be anomalous to treat an increased price as a trigger for a refund obligation which would leave the producer with a smaller net return than if it had never increased its price at all."

In the Supreme Court's words, in *Sunray DX Oil*, refund orders of that nature "amount to a reparation order, and this Court has repeatedly held that the Commission has no reparation power" (391 U.S. 9, 24).

10. Furthermore, it is perfectly clear that Congress did not intend that the Natural Gas Act be applied by the Commission in cases of this nature completely to ignore long standing contracts which were made in complete good faith approximately nine years before the Supreme Court's decision in *Lo Vaca* or to force small, family-operated natural gas companies such as Plaquemines into bankruptcy because of some technicality under the Act. In

the case at bar, the original 1956 contract did not contain any vague escalation or "favored nation" clauses such as those involved in *Socony Mobil Oil Co., supra,* or *Shell Oil Co., supra. On the contrary, from the very outset it established fixed, announced prices for the period from 1956 to November 1, 1959 and from November 1, 1959 to November 1, 1964; and from November 1, 1964 to November 1, 1969.* Thus, in reality, there was *no* actual *change* or increase in the *contract price* originally set in 1956 for the 1964-1969 sales period. Rather, under the precise terms of the 1956 contract, the price originally established for the period 1964-1969 was simply charged by Plaquemines starting November 1, 1964. The Commission has very fairly and properly excused Plaquemines for not having filed its 1959 contract rate, and we submit that, under the authorities, it should also waive the 1964 filing because the 1964 rate was expressly established in the original 1956 contract, nine years before the Supreme Court's decision in *Lo Vaca.*

In *United Gas Pipeline Co.* v. *Mobil Gas Service Corporation,* 350 U.S. 331 (1956), the Supreme Court stated that, in construing the Natural Gas Act:

> ". . . we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, . . . the Act expressly recognizes that rates to particular customers may be set by individual contracts."

And, in *Superior Oil Company* v. *Federal Power Commission,* C.C.A.9, 1963, 322 F.2d 601, cert. denied, 377 U.S. 922, it was held that "the Commission must give consideration to the . . . price provided for in the contract, and other contract terms relating to initial *or future prices*"; and "there should at least be a most careful scrutiny and responsible reaction to [contract] price proposals . . . under § 7".

In other words, it is Plaquemines' position that the Commission should not penalize it in a certificate proceeding under Section 7 of the Act in 1970 for collecting in 1964 the exact price established by a 1956 contract with Tennessee—the 1956 contract and the 1964 collection all having preceded the 1965 decision of the Supreme Court in *Lo Vaca.* Or, to put it another way: The Commission should not penalize Plaquemines for following a 1956 contract price provision in 1964, at a time before the Commission's jurisdiction over Plaquemines was even asserted or determined. Certainly, such a questionable penalty should not be imposed in a *certificate proceeding under Section 7 of the Act whereunder the Courts have regularly upheld the Commission's power to grant such certificates without the imposition of conditions as to rate or refund.* (*Oklahoma Natural Gas Co.* v. *Federal Power Commission,* C.C.A. D.C. 1958, 257 F.2d 634, cert. denied 359 U.S. 27; *Florida Economic Advisory Council* v. *Federal Power Commission,* C.C.A. D.C. 1958, 251 F.2d 643, cert. denied 356 U.S. 959.) The granting of a certificate is a matter peculiarly within the *discretion* of the Commission and in a case of this kind under *Lo Vaca* it should simply refuse to impose outrageous, burdensome conditions on their issuance (See 257 F.2d 643, 639, 640).

11. The refund ordered by the Commission in Opinion No. 572-A would compel Plaquemines to refund approximately *$50,000.* to Tennessee. What benefit that refund will be to Tennessee or to the consumers represented herein by the New York Public Service Commission is not apparent on the face of the record, but at best it will be inconsequential. Simultaneously, however, the record shows that for 1968 Plaquemines' net income was only *$2,386.* and in 1967 Plaquemines suffered a loss of $12,436. in its operations.[1]

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[1] The record also shows that Plaquemines' net worth fell from $81,603 in 1966 to $65,000 in 1968.

In 1969, the southeastern section of Louisiana in which all of the facilities, operations and customers of Delta and Plaquemines are located, was hit head-on by the devastating winds and waters of Hurricane Camille. The two companies sustained losses, including lost revenues from approximately 1,500 natural gas meter customers, of approximately *$225,000.*

How can it be fairly concluded that, under those conditions, the Commission should now also endeavor to harness Plaquemines with a $50,000. refund to Tennessee for a technical, unintentional failure to file a rate in 1964 before the Commission even asserted jurisdiction over Plaquemines and before *Lo Vaca* was even settled by the Supreme Court? To do so, of course, would almost certainly destroy Plaquemines' and it would leave the consumers interested in Plaquemines' operations without a source of natural gas which they have enjoyed, at just and reasonable rates, since 1956.

As stated before, under Section 7(e), the Commission has authority, in its complete discretion, to attach conditions to the issuance of the permanent certificate or it may refuse to impose any conditions at all. It must not impose unsound conditions or conditions that lack sound support in the record (*Pure Oil Company* v. *Federal Power Commission,* C.C.A.7, 1961, 292 F.2d 350; *California Oil Company* v. *Federal Power Commission,* C.C.A. 10, 1963, 315 F.2d 652, 656); and where the Commission imposes an improper rate condition, the courts have not hesitated to set aside the Commission's order (*Pure Oil Company* v. *Federal Power Commission, supra*).

In fact, in cases where the record clearly showed, as does the record in the case at bar, that a refund condition imposed on a natural gas company is financially impossible to enforce or that it would tend to destroy or seriously impair the natural gas company involved, the Commission has voluntarily waived and terminated the refund

requirement (*Wisconsin* v. *Federal Power Commission,* 373 U.S. 294, 300, 301).

WHEREFORE, Plaquemines Oil and Gas Company, Inc. respectfully requests the Commission to grant rehearing and reconsideration of its Opinion and Order No. 572-A and, upon such rehearing and reconsideration, to vacate that portion of said Opinion and Order which directed Plaquemines to refund 1 cent per mcf to Tennessee for natural gas sold during the period from November 1, 1964 through July 28, 1966.

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May 28, 1970.

Opinion No. 572-B

Opinion and Order Denying Application for Rehearing and Reconsideration

(Issued June 23, 1970)

O'CONNOR, Commissioner:

1. On May 28, 1970, the Plaquemines Oil and Gas Company filed an application for rehearing and reconsideration of that portion of our Opinion No. 527-A dated April 29, 1970, that requires Plaquemines to make refunds to Tennessee Gas Pipeline Company. In that Opinion, we held that Plaquemines may be excused from its failure to file its rates with us prior to our 1961 decision in *Lo-Vaca Gathering Company,* 26 FPC 606; that Plaquemines' price of 19.5 cents per Mcf from that date in 1961 until escalation to 20.5 cents in 1964 was justified by the public con-

venience and necessity; but that Plaquemines' failure to file with us that escalation in price, effective November 1, 1964, cannot be excused. We agreed to construe Plaquemines' certificate application of June 27, 1966, in which it set forth its 20.5-cent price, as a rate increase filing, with the effective date being July 29, 1966. In these circumstances, we concluded that Plaquemines must refund to Tennessee 1 cent per Mcf for gas sold by it to Tennessee from the November 1, 1964, escalation date through July 28, 1966.

2. In its application now before us, Plaquemines argues that it ought not to be required to make refunds, essentially because it is a small company, confronted by complicated, changing, and sometimes ambiguous legal requirements. Our jurisdiction over certain of its sales, Plaquemines asserts, was not "final and absolute" until the Supreme Court's *Lo-Vaca* decision in 1965 (379 U.S. 366); and we did not "actually assert" jurisdiction over Plaquemines until 1966. Furthermore, Plaquemines contends that its 20.5-cent rate was, in fact, just and reasonable as of November 1, 1964, and that the refund requirement therefore constitutes a fine or a penalty.

3. We answer these contentions in turn. In recognition of the equities, we have sought to treat Plaquemines as fairly and indeed as generously as the law allows, but we cannot absolve it from its statutory obligations. Plaquemines was obliged by section 4 of the Natural Gas Act to file its 1964 tariff increase with us, but did not do so. While it is true that our 1961 *Lo-Vaca* decision was not upheld by the Supreme Court until 1965, it is equally true that this Commission ruled squarely, on the earlier date, that companies such as Plaquemines were at that time within our jurisdiction. We have held that others similarly situated were "on notice" after our 1961 *Lo-Vaca* decision that certain of their sales "might be jurisdictional", and that refunds after that date are there-

fore required. *Hugoton Production Company,* 41 FPC 490 at 497 (1969). We cannot conclude otherwise here. Our 1966 invitation to Plaquemines that it file with us did not serve to commence Plaquemines' responsibilities under the Natural Gas Act. It served instead as a reminder that such responsibilities ought forthwith to be met. The requirements of the Natural Gas Act do not depend for their effectiveness upon the initiative of this Commission. Finally, with respect to Plaquemines' contention that as of November 1964 its 20.5-cent charge was just and reasonable, we are confronted by the twin considerations that the record is empty of support for the contention, and that the failure to file for the increase renders the higher rate unlawful. The second consideration alone compels the result that we reach.

4. In connection with the ordered refunds, it is necessary that we require a refund report and the payment of interest on the ordered refunds. Simple interest should be included at our usual 7 percent per annum rate to the date of the report. In Opinion No. 527-A, we ordered Plaquemines to retain the amount of money ordered to be refunded, pending our further orders. If Plaquemines elects to commingle the retained refunds with its general assets, interest during the period the fund is retained will be at the prime rate. If Plaquemines elects to deposit the retained refund in an escrow account, there will be no further charges for interest, except what is earned.

The Commission further finds:

The assignments of error and grounds for rehearing set forth in the application for rehearing and reconsideration filed in this proceeding present no facts or legal principles which would warrant any change in or modification of the Commission's Opinions No. 572 and No. 572-A and the accompanying orders.

The Commission orders:

(A) Plaquemines shall file with the Commission within 60 days of the date of this order a report, subject to the Commission's approval, showing the product of the volume of gas sold by it to Tennessee during the period from and including November 1, 1964, through July 28, 1966, multiplied by 1 cent per Mcf. Simple interest shall be added at the rate of 7 percent per annum to the date of the report.

(B) Plaquemines shall retain an amount of money equal to that shown in the report required under paragraph (A), subject to further orders of the Commission directing the disposition of the amount. If Plaquemines elects to commingle the retained refund with its general assets and use it for corporate purposes, it shall pay interest thereon at the prime rate of interest in effect on the date of filing the report required in paragraph (A), from the date of filing the report to the date on which the refund is paid over to the persons ultimately determined to be entitled thereto in a final order of the Commission. If Plaquemines elects to deposit the retained refund in a special escrow account, Plaquemines shall tender for filing on or before the date of the filing of the refund report an executed Escrow Agreement. Unless notified to the contrary by the Secretary within 30 days from the date of filing thereof, the Escrow Agreement shall be entered into between Plaquemines and any bank or trust company used as a depositor for funds of the United States Government.

(C) The application for rehearing and reconsideration filed by Plaquemines Oil and Gas Company is denied.

(D) Opinions Nos. 572 and No. 572-A are in all other respects affirmed.

By the Commission.

[SEAL]

GORDON M. GRANT,
Secretary.

This contract, made and entered into this 14th day of June, 1956, by and between Plaquemines Oil & Gas Company, Inc., a Louisiana corporation, hereinafter called "Seller", and Tennessee Gas Transmission Company, a Delaware corporation, hereinafter called "Buyer".

WITNESSETH THAT:

In consideration of the covenants and agreements hereinafter set forth, to be kept and performed by the parties hereto, it is agreed by and between said parties as follows:

1. *Definitions*—For the purpose of this contract the following definitions shall be applicable:

(a) The term "gas" shall include casinghead gas produced with crude oil, natural gas from gas wells, and residue gas resulting from processing both casinghead gas and gas well gas.

(b) A day shall begin at 8 o'clock A.M. on each calendar day and end at 8 o'clock A.M. on the following calendar day, and a month or year shall begin at 8 o'clock A.M. on the first calendar day of such period of time and end at 8 o'clock A.M. on the first calendar day following such period.

(c) The term "MCF" shall mean one thousand (1,000) cubic feet.

(d) The term "contract quantity" shall mean the quantity per day specified in item (i) of Subsection (a) of Section 2.

2. *Quantity:*

(a) Subject to the terms and provisions of this contract, Seller agrees and covenants to sell and deliver or cause to be delivered to Buyer, and Buyer agrees to purchase and receive (or if available and not taken, Buyer agrees to pay for) the following quantities of gas per day for use

by Buyer for fuel requirements in Buyer's Compressor Stations located in the State of Louisiana:

(i) A quantity equal to three thousand (3,000) MCF. Seller shall have the right and option at any time during the first five (5) years of the term of this contract to increase the contract quantity to an amount not to exceed ten thousand (10,000) MCF by giving Buyer ninety (90) days written notice of its intention to so increase the contract quantity.

(b) The gas purchased hereunder shall be delivered and received as nearly as practicable at uniform hourly and daily rates of flow. The daily quantity of gas delivered and taken may vary ten per cent (10%) above or below the contract quantity, but in no event, however, shall the total contract quantity delivered and taken during any month vary more than five per cent (5%) above or below the total contract quantity for such month. Any deficit occurring by reason of such permitted variation shall, subject to each party's ability so to do, be adjusted in gas as soon as reasonably possible but not after twelve (12) months from the accrual of such deficit.

3. *Dedication:*

Subject to the terms and provisions of this contract, Seller agrees and convenants to deliver or cause to be delivered to Buyer from properties owned or controlled by Seller in Plaquemines Parish, Louisiana, a quantity of gas equal to twenty-two million (22,000,000) MCF during the term hereof. In the event the contract quantity is increased as provided in Section (i) of Subsection (a) of Section 2 hereof, Seller agrees and covenants to deliver or cause to be delivered from such properties an additional quantity of gas to be determined as follows:

A=The number of days remaining in the term after effective date or dates of increase in contract quantity.

B=The increase in contract quantity.

A $\times$ B MCF=Additional quantity to be produced and delivered.

4. *Prices* The prices to be paid by Buyer to Seller for all gas delivered to or, if available and not taken by Buyer, to be paid for hereunder, shall be as follows:

From date of initial delivery hereunder to November 1, 1959	17 Cents per MCF
From November 1, 1959 to November 1, 1964	18 Cents per MCF
From November 1, 1964 to November 1, 1969	19 Cents per MCF
From November 1, 1969 to November 1, 1974	20 Cents per MCF
From November 1, 1974 to date of expiration of this contract	21 Cents per MCF

Seller shall pay all Federal and State of Louisiana production, severance, or similar taxes now being levied in respect of or applicable to the gas delivered hereunder; provided, however, that if any such taxes in addition to or greater than these being levied at the date hereof are hereafter levied and seller is liable for the payment or collection of such additional or greater tax so long as such additional or greater tax is in effect and paid by Seller on such gas, Buyer will reimburse Seller three-fourths (3/4) of the amount by which such additional or greater tax shall exceed the taxes now levied.

Buyer shall reimburse Seller the amounts for which Seller is liable and pays to the State of Louisiana applicable to the gathering tax imposed by Act No. 11, Louisiana Laws of 1948, as amended by Act No. 45, Louisiana Laws of 1954, in respect of or applicable to gas delivered hereunder and Buyer will pay or reimburse Seller any and all similar

taxes hereafter levied or assessed by Federal or State of Louisiana Laws in respect of or applicable to such gas imposed upon or payable by Buyer or Seller respectively; provided however, that during any time when the amount of such taxes is in excess of the amount of tax levied by said Act No. 11, Louisiana Laws of 1948, Buyer shall be obligated hereunder to pay or reimburse Seller only three-fourths (3/4) of such excess, and Seller shall be obligated hereunder to pay or reimburse Buyer one-fourth (1/4) of such excess. The amount for which reimbursement is to be made by Seller to Buyer or by Buyer to Seller under this paragraph shall be billed quarterly.

Notwithstanding any provision of this contract to the contrary, if, in order to comply with or by reason of any present or future law or rule, regulation or order of the Conservation Commission of Louisiana or other governmental body, the basis or method of measurement of gas delivered hereunder is changed, then the price per MCF for gas purchased hereunder shall be adjusted to compensate for the change in the basis or method of measurement, to the end that the total amount of money payable for volumes of gas purchased according to the measurement provisions set forth herein shall remain unaffected by such change of basis or method of measurement.

5. *Delivery Pressure and Point of Delivery:*

(a) Seller shall make deliveries of gas hereunder to Buyer at a pressure sufficient to enter Buyer's facilities, but in no event shall such required pressure exceed one thousand (1,000) pounds per square inch gauge. Neither Seller nor Buyer shall be obligated to install or operate compression facilities in order to deliver or receive gas hereunder, but either Seller or Buyer may do so at its option.

(b) The point of delivery for all gas delivered to Buyer hereunder shall be a valve to be installed by Buyer on Buyer's Main Pass Block 35 Lateral on the West side of

the Mississippi River Crossing, at which point title to gas delivered hereunder shall pass from Seller to Buyer.

6. *Measurement and Tests*—The measurement and tests for quality of gas delivered hereunder shall be governed by the following:

(a) The volume shall be measured by orifice meter installed and operated, and computations made, as prescribed in Gas Measurement Committee Report No. 3 of the American Gas Association.

(b) The unit of volume for purposes of measurement shall be one (1) cubic foot of gas at a temperature base of sixty degrees (60°) Fahrenheit and at a pressure base of fifteen and twenty-five thousandths (15.025) pounds per square inch absolute.

(c) The arithmetical average of the hourly temperature and specific gravity recorded during each day, and the corrections for deviation from Boyle's Law applicable during each day shall be used to make proper computations of volumes hereunder. Chart integration and volume computation shall be made by Seller as accurately as possible and within the accuracy prescribed by the manufacturer of the computing equipment used.

(d) Temperature shall be determined by a recording thermometer continuously used and installed so as to record properly the temperature of the gas flowing through the meter.

(e) Specific gravity shall be determined with accuracy to nearest one thousandth by taking samples of the gas at the delivery point at such times as may be designated by Buyer, but not more often than once each month, and having the specific gravity determined by the use of the Acme gravity balance.

(f) Deviation from Boyle's Law at the pressures, specific gravity and temperatures upon delivery shall be deter-

mined by joint test at intervals of three (3) months, or as often as found necessary. The apparatus and method recommended by the National Bureau of Standards, or as otherwise mutually agreed upon, shall be used in making such tests. Each test shall determine the corrections to be used in computing volume until the next test is made.

(g) The total heat value of the gas shall be determined by joint tests made by taking samples of the gas at the delivery point at such times as may be designated by Buyer, but not more often than once each month, and having the British thermal unit content per cubic foot determined by calorimeter test. The British thermal unit content per cubic foot shall be determined by an accepted type of recording calorimeter for a cubic foot of gas at a temperature of sixty degrees (60°) Fahrenheit when saturated with water vapor and at an absolute pressure equivalent to thirty inches (30″) of mercury at thirty-two degrees (32°) Fahrenheit.

(h) Tests to determine sulphur and hydrogen sulphide content shall be made by approved standard methods in general use by the gas industry, and the water vapor content shall be determined by use of dew-point apparatus approved by the Bureau of Mines. Correction for water vapor content shall be made upon request by Buyer, in determining the volume of gas delivered hereunder.

(i) All measuring and testing equipment, housing, devices and materials shall be of standard manufacture and type approved by Buyer, and shall, with all related equipment, appliances and buildings be installed, maintained and operated, or furnished by Seller, at Seller's expense, and the size, type and specifications of the foregoing must be approved by the Buyer before same is fabricated and installed at the delivery point. Buyer's approval shall not be unreasonably withheld. Buyer may install and operate check measuring and testing equipment which shall not interfere with the use of Seller's equipment.

(j) The accuracy of Seller's measuring and testing equipment shall be verified at least once each month and at other times upon request of Buyer or Seller. Tests for quality of the gas may be made at the time of testing equipment or at other, but not more often than once each month. Notice of the time and nature of each test shall be given by Seller to Buyer sufficiently in advance to permit convenient arrangement for Buyer's representative to be present. Measuring and testing equipment shall be tested by means and methods approved by Buyer (which approval shall not be unreasonably withheld). Tests and adjustments shall be made in the presence of and observed by representatives of both Buyer and Seller, if present. If, after proper notice, Buyer fails to have a representative present, the results of the tests shall nevertheless be considered accurate until the next tests are made. All tests shall be made at Seller's expense, except that Buyer shall bear the expense of tests made at its request if the inaccuracy found is two per cent (2%) or less.

(k) If at any time any of the measuring or testing equipment is found to be out of service, or registering inaccurately in any percentage, it shall be adjusted at once to read accurately, within the limits prescribed by the manufacturer. If such equipment is out of service, or inaccurate by an amount exceeding two per cent (2%) at a reading corresponding to the average rate of flow for the period since the last preceding test, the previous readings of such equipment shall be disregarded for any period definitely known or agreed upon, or if not so known or agreed upon, for a period of sixteen (16) days or one-half of the elapsed time since the last test, whichever is shorter. The volume of gas delivered during such period shall be estimated by (a) using the data recorded by any check measuring equipment if installed and accurately registering, or if not installed or registering accurately, (b) by correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation,

or, if neither such method is feasible, (c) by estimating the quantity, or quality, delivered, based upon deliveries under similar conditions during a period when the equipment was registering accurately. No correction shall be made for recorded inaccuracies of two per cent (2%) or less.

(l) Buyer and Seller shall have the right to inspect equipment installed or furnished by the other, and the charts and other measurement or testing data of the other, at all times during business hours; but the reading, calibration and adjustment of such equipment and changing of charts shall be done only by the party installing and furnishing the same. Each party shall preserve all original test data, charts and other similar records, in such party's possession, for a period of at least three (3) years.

(m) Seller shall at its expense, furnish Buyer necessary data daily as required for calculating average hourly volumes delivered during the preceding twenty-four (24) hour period.

7. *Quality of Gas*—Seller agrees that the gas delivered hereunder will be merchantable gas and will upon delivery:

(a) Have a total heating value of not less than one thousand (1,000) British thermal units per cubic foot; however, should the total heating value of the gas fall below one thousand (1,000) British thermal units per cubic foot during any month, Buyer, at Buyer's sole discretion, may refuse to accept delivery thereof, or may accept delivery thereof and reduce the total amount payable as the purchase price for gas delivered under this agreement for each month during which such condition obtains by an amount determined by multiplying such total amount by a fraction having as its numerator the deficiency of British thermal units below one thousand (1,000) and as its denominator one thousand (1,000);

(b) Be commercially free from dust, hydrocarbon liquids and water contained in the gas stream as entrained or free

liquids and any other substance that might become separated from the gas in Buyer's pipe lines; and Seller will furnish, install, maintain and operate such drips, separators, heaters and other mechanical devices which may be necessary to effect compliance with such requirements;

(c) Not contain more than twenty (20) grains of total sulphur, or more than one (1) grain of hydrogen sulphide, per one hundred (100) cubic feet;

(d) Have a temperature of not more than one hundred twenty degrees (120°) Fahrenheit; and

(e) Have been dehydrated by Seller for removal of water present therein in a vapor state, and in no event contain more than seven (7) pounds of water per million cubic feet, at a pressure base of fourteen and seven-tenths (14.7) pounds per square inch and a temperature of sixty degrees (60°) Fahrenheit as determined by dew-point apparatus approved by the Bureau of Mines.

8. *Billings and Payments:*

(a) On or before the 15th day of each month after deliveries of gas are commenced Seller shall render Buyer a statement for the preceding month showing the amount of gas delivered hereunder, the amount due therefor and information sufficient to explain and support any adjustments in volume made by Seller in determining the amount billed.

(b) Buyer will pay Seller at the address as shown in Section 13 hereof, on or before the 25th day of each month, or as to statements rendered after the 15th, within ten (10) days after receipt of such statements, for gas delivered during the preceding month, according to the measurements, computations and prices herein provided. If the correct amount is not paid when due, interest on any unpaid amount shall accrue at the rate of six per cent (6%) per annum. If such default continues after sixty (60) days after written notice from Seller to Buyer, Seller may sus-

pend gas deliveries hereunder without prejudice to other remedies.

(c) If any overcharge or undercharge in any form whatsoever shall at any time be found and the bill therefor has been paid, Seller shall refund the amount of the overcharge received by Seller and Buyer shall pay the amount of undercharge within thirty (30) days after final determination thereof.

(d) If for any month Buyer pays for gas not received Buyer may credit such payment against payments due hereunder at time of actual delivery for quantities taken in excess of the contract quantity for any month or months within sixty (60) months after such payment is made for gas not received.

9. *Term of Contract*—Subject to the other provisions to this agreement this contract shall be in force from its date for a term expiring twenty (20) years after the date of initial delivery of gas hereunder.

10. *Warranty of Title to Gas*—Seller warrants title to all gas delivered hereunder by it, that it has the right to sell the same, and that such gas is free from liens and adverse claims of every kind. Seller will pay or cause to be paid, all royalties, taxes and other sums due on production, gathering or handling of the gas delivered by such Seller. Seller will indemnify and save Buyer harmless against all loss, damage and expense of every character on account of adverse claims to the gas delivered by it or of royalties, taxes, payments or other charges thereon applicable before or upon delivery to Buyer. If Seller's title is questioned, or involved in any action, Buyer may withhold payment (without interest) of sums due hereunder up to the amount of the claim until title is freed from such question or such action is finally determined, or until Seller furnishes bond conditioned to save Buyer harmless with sureties satisfactory to Buyer.

11. *Force Majeure*—If either Buyer or Seller is rendered unable, wholly or in part, by force majeure or any other cause of any kind not reasonably within its control to perform or comply with any obligation or condition of this contract, upon giving notice and reasonably full particulars to the other parties such obligation or condition shall be suspended during the continuance of the inability so caused and such party shall be relieved of liability and shall suffer no prejudice for failure to perform the same during such period; provided obligations to make payments then due for gas delivered hereunder shall not be suspended, and the cause of suspension (other than strikes or lockouts) shall be remedies so far as possible with reasonable dispatch. Settlement of strikes and lockouts shall be wholly within the discretion of the party having the difficulty. The term "force majeure" shall include, without limitation by the following enumeration, acts of God and the public enemy, the elements, fire, accidents, breakdowns, strikes and any other industrial, civil or public disturbance, inability to obtain materials, supplies, permits or labor, any act or omission (including failure to take gas) of a purchaser of gas from Buyer which is excused by any event or occurrence of the character herein defined as constituting force majeure, temporary failure of gas supply, and any laws, orders, rules, regulations, act or restraints of any government or governmental body or authority, civil or military.

12. *Regulatory Bodies*—This contract shall be subject to all valid applicable State and Federal Laws, and orders, directives, rules and regulations of any governmental body or official having jurisdiction.

13. *Miscellaneous:*

(a) No waiver by Buyer or Seller of any default of the other under this contract shall operate as a waiver of any future default whether of like or different character.

(b) This agreement shall bind and inure to the respective successors and assigns of the parties hereto; but no

assignment shall relieve any party's obligations hereunder without the written consent of the other parties.

(c) Every notice, request, statement or bill provided for in this contract shall be in writing directed to the party to whom given, made, or delivered at such party's address as follows:

Buyer: Tennessee Gas Transmission Company
Commerce Building
Houston, Texas

Seller: Plaquemines Oil & Gas Company, Inc.
P. O. Box 941
New Orleans, Louisiana

or at such other post office address as such party shall from time to time designate as the address for such purpose by registered letter addressed to the other party.

In Witness Whereof, this instrument is executed in several counterparts, each of which shall be an original, as of the date first above mentioned.

Tennessee Gas Transmission Company
By (Signature Illegible)
Vice President

Buyer

Attest:
B. G. Wilkinson
Assistant Secretary

Plaquemines Oil & Gas Company, Inc.
By A. J. Brooks, Jr.
Vice President

Seller

Attest:
(Signature Illegible)
Assistant Secretary

PLAQUEMINES OIL AND GAS COMPANY, INC.

Cost of Service for
Sale to Tennessee Gas Pipeline Company
1968 and 1969 (estimated)

		1968		1969 (estimated)	
		Total	TGP	Total	TGP
	Cost of Service:	(A)	(B)	(C)	(D)
(1)	Gas Purchases	$452,821	$421,576 [1]	$341,788	$315,129 [2]
(2)	Pipeline Transportation Charges	38,800	36,123 [1]	28,899	26,645 [2]
(3)	Officers' Salaries	24,000	22,344 [1]	24,000	22,128 [2]
(4)	Other Salaries and Wages	5,988	5,575 [1]	6,006	5,538 [2]
(5)	Other Expenses	16,159	15,044 [1]	24,334	22,436 [2]
(6)	Total	$537,768	$500,662	$425,027	$391,876
(7)	Revenues	540,154	492,553	408,092	355,269
(8)	Revenue Excess or (Deficiency)	$ 2,386	$ (8,109)	$(16,935)	$(36,607)
(9)	Operating Ratio	99.6%	101.6%	104.1%	110.3%

[1] Allocated to Tennessee Gas Pipeline Company on the basis of Mcf sales.

	Mcf	Per Cent
TGP	2402698	93.1%
Shell-Delta	178353	6.9
Total	2581051	100.0%

[2] Allocated to Tennessee Gas Pipeline Company on the basis of Mcf sales.

	Mcf	Per Cent
TGP	1776344	92.2%
Shell	150230	7.8
Total	1926574	100.0%

EXHIBIT 4

COST OF SERVICE

Sale to Tennessee Gas Pipeline Company by
Plaquemines Oil and Gas Company, Inc.
1968

	Cost of Service:	Amount
(1)	Gas Purchases	$421,576 [1]
(2)	Operation and Maintenance	31,150 [2]
(3)	Depreciation	14,726 [2]
(4)	Revenues From the Sale of Plant Liquids	(9,636) [2]
(5)	Taxes Other Than Income Taxes	2,876 [2]
(6)	Salaries and Wages	27,919 [1]
(7)	Other Expenses	6,236 [3]
(8)	Rate Case Expenses	9,000 [4]
(9)	Federal Income Taxes @ 52.8%	9,575 [2]
(10)	Return @ 8.7%	13,694 [2]
(11)	Total	$527,116
(12)	Revenues	$492,553 [1]
(13)	Revenue Excess or (Deficiency)	$(34,563)

[1] Exhibit 2.

[2] Exhibit 3.

[3] $16,159 (per Auditors Report) less $6,383 for dehydration of gas by others less $3,540 for outside legal and consulting fees.

[4] One-third of estimated outside legal and consulting fees for pending rate cases.

Exhibit 6

Plaquemines Oil and Gas Company, Inc.

Financial Statements as of December 31, 1968 Together With Auditors' Report

April 2, 1969

To the Board of Directors of
Plaquemines Oil and Gas Company, Inc.:

We have examined the balance sheet of Plaquemines Oil and Gas Company, Inc. (a Louisiana corporation) as of December 31, 1968 and 1967, and the related statement of income (loss) and retained earnings for the years then ended. Our examinations were made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the accompanying financial statements present fairly the financial position of Plaquemines Oil and Gas Company, Inc., as of December 31, 1968 and 1967, and the results of its operations for the years then ended, in conformity with generally accepted accounting principles applied on a consistent basis during the periods.

PLAQUEMINES OIL AND GAS COMPANY, INC.

Balance Sheet—December 31, 1968 and 1967

ASSETS

	1968	1967
CURRENT ASSETS:		
Cash	$ 46,581	$ 39,033
Accounts receivable—		
Trade	74,472	59,609
Affiliated company	—	11,064
Total current assets	$121,053	$109,706
ADVANCE TO AFFILIATED COMPANY	20,000	20,000
NON-INTEREST BEARING NOTE RECEIVABLE FROM AN OFFICER AND STOCKHOLDER	20,000	20,000
PROPERTY AND EQUIPMENT, at cost, net of accumulated depreciation of $1,535 at December 31, 1968 and $1,435 at December 31, 1967	8,344	9,344
	$169,397	$159,050

LIABILITIES

	1968	1967
CURRENT LIABILITIES:		
Current portion of note payable	$ 2,250	$ 2,250
Accounts payable—		
Trade	79,069	89,025
Affiliated companies	20,440	847
Accrued liabilities	1,138	564
Total current liabilities	$102,897	$ 92,686
6% UNSECURED NOTE PAYABLE, due in February, 1969, less current portion shown above	—	2,250
STOCKHOLDERS' INVESTMENT:		
Capital stock, no par value; authorized and outstanding, 2,000 shares	$ 1,000	$ 1,000
Retained earnings	65,500	63,114
	$ 66,500	$ 64,114
	$169,397	$159,050

(The accompanying notes to financial statements are an integral part of this balance sheet.)

PLAQUEMINES OIL AND GAS COMPANY, INC.

Statement of Income (Loss) and Retained Earnings for the Years Ended December 31, 1968 and 1967

	1968	1967
GAS SALES (Note 1)	$540,154	$749,055
EXPENSES:		
Gas purchases	$452,821	$629,452
Pipeline transportation expenses	38,800	51,955
Officers' salaries	24,000	39,667
Other salaries and wages	5,988	19,684
Other expenses (including depreciation, computed on the straight-line method, of $100 in each year)	16,159	20,733
	$537,768	$761,491
NET INCOME (LOSS)—Note 2	$ 2,386	$(12,436)
RETAINED EARNINGS, beginning of year	63,114	81,603
	$ 65,500	$ 69,167
LESS—Dividends paid, $3.03 per share in 1967	—	6,053
RETAINED EARNINGS, end of year	$ 65,500	$ 63,114

(The accompanying notes to financial statements are an integral part of this statement.)

Plaquemines Oil and Gas Company, Inc.

Notes to Financial Statements

December 31, 1968

(1) Gas sales contract—

The company's operations consist primarily of the purchase, transportation and sale of gas. In 1968, 91% of the company's gas sales were made under contract to one customer. Under the contract, various minimum quantities of gas were required to be purchased. The 1968 required minimum purchase of gas by the customer was exceeded during the year.

(2) Federal income taxes—

For Federal income tax reporting purposes, the company and its stockholders have elected under Subchapter S of the Internal Revenue Code to include the operating income or losses of the company and the investment tax credit available to it in the stockholders' individual income tax returns. Accordingly, Federal income taxes of $575, otherwise payable by the company for the year ended December 31, 1968, were eliminated.

PETITIONER'S BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,550

PLAQUEMINES OIL AND GAS COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

On Petition for Review of Orders of the Federal Power Commission

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United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 7 1970

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CLERK

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TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES: *

* Cases or Authorities chiefly relied upon are marked by asterisks.

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United States Court of Appeals

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Plaquemines Oil and Gas Company, *Petitioner*

v.

Federal Power Commission, *Respondent*

On Petition for Review of Orders of the Federal Power Commission

---

PETITIONER'S BRIEF

STATEMENT OF ISSUES OR QUESTIONS PRESENTED FOR REVIEW

This case presents the following issues or questions for review:

1. Does the Federal Power Commission have the authority in a certificate proceeding under Section 7 of the Natural Gas Act to impose a sanction or penalty in the form of a refund order on petitioner solely because petitioner failed to file notice of a contractural rate increase

under Section 4 of the Act in 1964, at a time when petitioner had good and valid reasons to believe it was not subject to the Act? A subsidiary question here is whether such a sanction may be imposed by the Commission in a case where it finds that petitioner's rates under the 1956 contract involved have always been just, reasonable, warranted and acceptable to the Commission?

2. Does the Federal Power Commission have authority in a certificate proceeding under Section 7 of the Natural Gas Act to order a rate refund without any evidence to show that the rate involved was excessive or unreasonable, and without any finding of any kind by the Commission that said rate was, in fact, excessive or unreasonable? A subsidiary question here involved is whether the imposition of such a refund order, without any evidence or finding of rate unreasonableness to support it, deprives petitioner of due process in violation of the Fifth Amendment.

3. Was it unreasonable under Section 7(e) of the Natural Gas Act, as well as arbitrary and capricious, for the Commission to excuse petitioner's failure to file 1956 and 1959 rates under Section 4 of the Act, but to deny the same relief regarding petitioner's 1964 rate and to base a $62,000. refund order on that denial alone, in the face of a record which shows (a) that petitioner's obligation to file did not become legally fixed and certain until the Supreme Court's 1965 decision in *California* v. *Lo-Vaca Gathering Company*, 379 U.S. 366, and (b) the Commission itself did not assert any jurisdiction over petitioner until after that 1965 Supreme Court decision?

4. Was it unreasonable under Section 7(e) of the Natural Gas Act, as well as arbitrary and inequitable, for the Commission to order petitioner, under the facts here presented, to pay a $62,000. refund to Tennessee Gas Pipeline Company when (1) petitioner's current net worth is only $66,500., (2) petitioner has alternately suffered

losses or realized only slight profits on its sales to Tennessee; and (3) petitioner, in 1969, suffered devastating losses as a result of Hurricane Camille which struck its operations and facilities in southern Louisiana?

In response to the requirements of Rule 8(d) of the Rules of this Court, petitioner states that this case is before this Court for the first time and it has not been before this Court under the same or similar title at any prior time.

REFERENCES AND RULINGS

The Orders appealed from are the Federal Power Commission's Orders Nos. 572-A and 572-B issued on April 29 and June 23, 1970 respectively, pursuant to which petitioner was unconstitutionally and unlawfully directed by the Commission to make refunds of 1¢ per Mcf for natural gas sold by petitioner to Tennessee Gas Pipeline Company during the period from November 1, 1964 through July 28, 1966. The Commission's Orders 572, 572-A and 572-B are printed in the Joint Appendix at pages 3-8, 12-18, and 29-32 respectively.

STATEMENT OF THE CASE

On June 14, 1956, petitioner Plaquemines Oil and Gas Company, a very small family-owned and operated company doing business exclusively in the Mississippi Delta region of southern Louisiana, entered into a written contract with Tennessee Gas Transmission Company (hereinafter referred to as "Tennessee"),[1] pursuant to which petitioner agreed to sell Tennessee natural gas within the State of Louisiana over a period of 20 years (J.A. 3, 33-44). Title to all gas sold by petitioner was to pass to Tennessee at a specified point on the west bank of

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[1] During the period subsequent to 1956, Tennessee Gas Transmission Company's name was changed to Tennessee Gas Pipeline Company. The reference to "Tennessee" in this brief is to that same company, although, as indicated, during part of the period covered by this case the company's name was *Tennessee Gas Transmission Company.*

the Mississippi River within the State of Louisiana (J.A. 36, 37).

Under Paragraph 4 of the 1956 contract, Tennessee agreed to pay petitioner the following prices for gas sold during the 20 year contract term (J.A. 35):

"From date of initial delivery
to November 1, 1959 ....17 cents per McF

"From November 1, 1959 to
November 1, 1964 ....18 cents per McF

"From November 1, 1964 to
November 1, 1969 ....19 cents per McF

"From November 1, 1969 to
November 1, 1974 ....20 cents per McF

"From November 1, 1974 to date
of expiration of this contract ....21 cents per McF

As indicated above, petitioner's business activities were limited entirely to buying and selling natural gas within the borders of one parish (Plaquemines) in the State of Louisiana (J.A. 3-6). Petitioner purchased its gas supplies from three sources in Plaquemines Parish, Louisiana, and with the exception of relatively inconsequential sales to Shell Pipe Line Corporation and to an affiliated small concern, Delta Gas, Inc., petitioner's available supplies were sold to Tennessee at the aforementioned compressor station in Plaquemines Parish (J.A. 5).[2] Petitioner owned no pipeline facilities of its own, so in order to transport the gas it purchased in Louisiana for delivery to Tennessee at the compressor station mentioned above, peti-

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[2] The Commission ruled that petitioner's sales to Shell were *not* within the Commission's jurisdiction because Shell used the gas purchased from petitioner within the State of Louisiana, at Shell's refinery in Baton Rouge (J.A. 5). The Commission ruled, however, that petitioner's sales to its affiliate, Delta, were jurisdictional because Delta commingled the gas it bought from petitioner in its relatively small *intrastate* pipeline located exclusively in Plaquemines Parish with gas it transported for petitioner for sale to Tennessee at the aforementioned point in Plaquemines Parish (J.A. 4, 5).

tioner contracted with its affiliate, Delta, to perform that service through Delta's relatively small pipeline in Plaquemines Parish (J.A. 4-6).

Section 1(b) of the Natural Gas Act (15 U.S.C. § 717(b)), enacted by Congress in 1938, provides:

> "(b) The provisions of this Chapter shall apply to the *transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption . . . and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.*" (Italics supplied)

Because of these seemingly crystal clear provisions of the Act itself, the Federal Power Commission took no action for a period of more than 20 years after 1938 to attempt to regulate the activities of small *intrastate* producers, gatherers and pipeline companies such as petitioner whose activities were confined exclusively to local sales and distribution of natural gas within the borders of a single state. More particularly, the Commission took no steps to regulate petitioner's sales to Tennessee for a period of approximately 10 years after petitioner made the aforementioned contract with Tennessee in 1956 (J.A. 16).

In this regard, the record shows that on January 8, 1965 the Supreme Court of the United States reversed a ruling of the Fifth Circuit Court of Appeals in *California* v. *Lo Vaca Gathering Company,* 379 U.S. 366, and thus held for the first time that natural gas sales by small intrastate operators made within the confines of their own states are nevertheless subject to the Federal Power Commission's jurisdiction if the gas sold by the intrastate operator is delivered to a large interstate operator's pipeline and there commingled with gas to be sold by the interstate operator in interstate commerce. As a result

of that decision, the Commission wrote to petitioner in April, 1966 and suggested that, in light of *Lo Vaca,* it should apply for a certificate as an independent producer (J.A. 16). Petitioner immediately complied and on June 27, 1966, it filed an application for an independent producer's certificate (J.A. 16). However, because of the confusion which followed *Lo Vaca* in both the industry and the Commission, it developed that the Commission's suggestion to petitioner was erroneous (J.A. 16). The Commission had incorrectly asked petitioner to file as an independent producer since petitioner's operations in Louisiana were those of a small pipeline company. Accordingly, at the Commission's request, petitioner replaced its original application with a request for a certificate which would authorize it to continue to operate as a pipeline company in its sales to Tennessee under the 1956 contract described above (J.A. 16; 18-22).

After a long series of procedural delays, the Commission finally rendered an opinion and order on February 26, 1970 in which it held that petitioner was entitled to a Certificate of Public Convenience and Necessity for the "sale of natural gas in interstate commerce to the Tennessee Gas Pipeline Company" (J.A. 3-8). *In addition to granting the certificate, the Commission ruled that petitioner's prices for gas sold to Tennessee and established by the 1956 contract were just and reasonable, and that "the public convenience and necessity" warranted the continuation of those prices under the 1956 contract without reduction* (J.A. 6).[3] More particularly, the Commission ruled (J.A. 6):

> ". . . Upon a careful examination of the whole record, we are persuaded that these costs-of-service

---

[3] Petitioner's price to Tennessee under the 1956 contract for the 1964-1969 period was 20.5¢ per McF, including 19¢ per McF for the gas and 1.5¢ per McF for Louisiana severance tax, or 20.5¢ per McF. For the November, 1969–November, 1974 period, the contract price for the gas rose to 20¢ per McF plus 1.5¢ per McF for taxes, or 21.5¢ per McF *in toto*. The Commission approved both prices (J.A. 6).

were not effectively challenged; that each of the cost elements represented a legitimate cost; that none was excessive in amount; and that, without permitting in any particular the duplication of costs between Delta and Plaquemines, *the price of 21.5 cents per McF, for which Plaquemines may now contractually file, has been justified and represents a price which is warranted by the public convenience and necessity.* However, until Plaquemines makes appropriate filing for an increase in its rates to that level, the rate to be charged Tennessee shall continue to be 20.5 cents per McF."[4] (Italics supplied)

And, of course, since the Commission expressly found petitioner's contract rates to be *reasonable and "warranted by the public convenience and necessity,"* the Commission took *no* action of any kind in its initial opinion and order of February 26, 1970 (*Opinion No. 572*) to require petitioner to make any refunds of any kind as a condition to the issuance of the certificate prescribed by Section 7 of the Natural Gas Act (15 U.S.C. § 717f) (J.A. 3-8).

Thereafter, however, on March 30, 1970, the Public Service Commission of the State of New York which the Federal Power Commission had permitted to intervene in petitioner's application proceeding, filed a motion for rehearing in which it contended that since petitioner, in 1956 (9 years prior to the Supreme Court's decision in *Lo Vaca*), had failed to file its initial contract price to Tennessee with the Power Commission and had thereafter increased the initial price in line with the said contract but without filing with the Commission in 1959 and 1964 (again prior to the Supreme Court's decision in *Lo Vaca*),

---

[4] Petitioner immediately filed for authority to increase its rate to 21.5¢ as specified in the contract. The Notice was filed under Section 4 of the Natural Gas Act (15 U.S.C. § 717c), and since the Commission had already found that rate to be just and reasonable in its decision of February 26, 1970, the Commission summarily authorized petitioner to make the 21.5¢ per McF contract rate effective, and it is still in full force and effect.

those rates were *"forbidden in the absence of compliance with the filing provisions of the Act"*, and thus, the 1959 and 1964 price increases *"must be refunded"* (J.A. 10, 11).

On April 29, 1970, the Commission rendered its Opinion No. 572-A in which it again ruled that petitioner's current contract price of 20.5¢ per McF to Tennessee *"is a price which is consistent with the public interest"* (J.A. 13). The Commission reiterated its prior ruling that an increased price of 21.5¢ per McF (also specified by the contract for the 1969-1974 period) likewise *"appears in our judgment to be warranted"* (J.A. 14).[5] The Commission went on to rule, however, that petitioner should still "be required to refund to Tennessee 1 cent per McF for natural gas sold by Plaquemines to Tennessee during the period beginning November 1, 1964 and ending July 28, 1966" *solely because petitioner failed "to file the tariff increase to 20.5 cents per McF when such rate became effective, pursuant to Plaquemines' contract with Tennessee, on November 1, 1964"* (J.A. 15, 16).

In other words, in its Opinion No. 572-A of April 29, 1970, the Commission ruled that petitioner must be *penalized* or *punished* by means of a *refund assessment solely* because petitioner failed to file *its 1964 price increase* under the 1956 contract, when, in truth and in fact, such increase became effective (*like the initial 1956 contract price and the 1959 contractual price increase*) *prior* to the Supreme Court's landmark decision in *Lo Vaca, supra,* pursuant to which the Commission's jurisdiction over intrastate operations such as petitioner's first became legally fixed and effective (J.A. 16). The Commission so ruled while simultaneously admitting that *"on and after July 29,*

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[5] And, although the Commission stated that it did not preclude "a challenge to that price at such time as Plaquemines may file for it", no such challenge was made by anyone when Plaquemines made the filing and the 21.5¢ per McF rate has been in effect for several months and it will remain in effect as specified in the 1956 contract.

1966" petitioner's 1964-1969 price to Tennessee was *"justified"* (J.A. 17), *and that it had no basis for determining that the same price was not justified for the period from November, 1964 to July 28, 1966—the refund period specified in its Order* (J.A. 15-17). *Indeed, the Commission ruled that it undoubtedly "would have found the said rate acceptable" if it had been filed* (J.A. 15).

In support of its arbitrary, confiscatory refund conclusion, however, the Commission stated (J.A. 14-17):

> "The New York Commission asserts . . . that all amounts collected by Plaquemines in excess of its initial (1956) rate of 18 cents per McF are null and void and must be refunded, because none of the increases was the subject of a rate-filing under section 4(d) of the Natural Gas Act. . . . We agree with that proposition, but our agreement does not lead us to accept the New York Commission's conclusion.
>
> "In our view, *Plaquemines may reasonably be excused from its failure to seek a certificate from us, and to file its rate, prior to our own decision in Lo-Vaca Gathering Company,* 26 FPC 606 (1961). As we have observed in connection with independent producers, "the doctrine of that case may not have been predictable . . . The Producers might have felt, with some reason, that gas could have been isolated from the jurisdictional gas by contractual means". *Hugoton Production Company,* 41 FPC 490 (1969) . . . We have in this situation refrained 'as a matter of equity' from requiring refunds for periods prior to 1961, and we do so here. See also *George Despot,* et al., Docket Nos. CI 65-974."[6]

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[6] The Court will immediately note that if the Commission had adopted the 1965 date of the Supreme Court's decision in *Lo Vaca* rather than the 1961 date of *its own initial decision* in that same case, no refund would be supportable here, because like its 1956 and 1959 contract rates, petitioner's 1964 rate became effective before the Supreme Court's decision in *Lo Vaca.* By applying the 1961 date of its own decision, the Commission arbitrarily lost sight of the fact that its said 1961 decision was in fact later vacated and set aside by the Fifth Circuit Court of Appeals (See *Lo Vaca Gathering Co.* v. *Federal Power Commission,* 323 F.2d 190). Hence, the jurisdictional rule of *Lo Vaca* was *clearly not legally and finally implanted* until the Supreme Court's decision in 1965, *after petitioner's 1964 rate became effective.*

And, thus, at page 17 of the Joint Appendix, the Commission went on to conclude:

> "In summary, then, we conclude that Plaquemines may be excused from its failure to file with us prior to 1961; that its price from 1961 until escalation in 1964 was justified by the public convenience and necessity; that its 1 cent escalation in price from the contract escalation date in 1964 until the June 1966 filing was in excess of what the law permits, and must therefore result in refunds of 1 cent per McF for sales to Tennessee during that period; and that the record supports a finding of 20.5 cents per McF is warranted on and after July 29, 1966."

The Court's attention is directed to the fact that the Commission *admittedly* arbitrarily and capriciously reached its conclusion that petitioner's *"1-cent escalation in price from the contract escalation date in 1964 until the June 1966 filing was in excess of what the law permits"* without any support in the evidence before it and indeed contrary to the evidence available to it.[7] In this regard, the Commission's Opinion 572-A of April 29, 1970 states, at J.A. 15-17):

> "The record before us is virtually devoid of 1961 cost information. In these circumstances, we take notice of the then existing in-line price for on-shore independent gas producers in Southern Louisiana That price in 1961 was 20 cents per McF. *Union Texas Petroleum,* 32 FPC 254 (1964). While Plaquemines is a pipeline, and not a producer, we think it reasonable, in light of the then in-line price and the minimal size and impact of the sale here involved, to conclude that if Plaquemines had in 1961 filed with

[7] The statutory test of what "the law permits" is found in Section 4 of the Natural Gas Act (15 U.S.C. 717c). The test is simply that such rates *"shall be just and reasonable"*. Here, the record shows that from 1961 forward petitioner's rates were "just and reasonable" and the Commission so found (J.A. 15-17). Its *only* complaint against the 1964 increase was that petitioner failed to give notice, *prior* to the Supreme Court's decision in *Lo Vaca,* of that particular increase.

> us its then current price of 19.5 cents per McF for sales to Tennessee, we would have found the rate acceptable. . .
>
> "Although the record before us falls far short of containing the definitive cost information which is important in this kind of case, the record does contain some cost data with respect to the years 1965, 1966, and 1967. By taking all of that data into account, as well as the 1968 data discussed above, we conclude that the 20.5 cent price on and after July 29, 1966, is justified, and that refunds on and after that date are not required."

Thus, on the basis of the record before it and its own expertise in the field of gas prices in southern Louisiana, the Commission readily concluded that petitioner's price of 19.5¢ from 1961 through November, 1964 was *"acceptable", i.e., "just and reasonable";* and that its price of 20.5¢ from July 29, 1966 forward was *"justified", i.e. "just and reasonable";* and that its contract rate of 21.5¢ after November, 1969 was likewise in line with the statute. Thus, the Commission admittedly had nothing whatsoever before it even to suggest that petitioner's price of 20.5¢ from November, 1964 to July 28, 1966 was anything but also "acceptable", "justified", "warranted" and "just and reasonable". *Ergo,* its sole reason for arbitrarily holding that the price for that relatively short period was *"in excess of what the law permits"* was its unlawful, unconstitutional desire to single out the 1964 contract price increase *alone* and to saddle petitioner with a *penalty* or *fine* for not filing that rate increase at a time *before Lo Vaca* became legally set as the law of the land in both the Commission's mind and in the mind of the industry as a whole.

In any event, petitioner applied to the Commission for rehearing and reconsideration with reference to its said refund order (J.A. 18-29). On June 23, 1970, the Commission denied petitioner's application and directed petitioner (1) to file a refund report within 60 days and (2)

to prepare forthwith to obtain the funds necessary to make the said refund to Tennessee, together with interest at the rate of 7% per annum from November 1, 1964.

In the meantime, while these proceedings were pending before the Commission, Plaquemines Parish, Louisiana was devastated by Hurricane Camille, and vast losses were sustained by petitioner and its small affiliate, Delta Gas, Inc. (J.A. 28). The two companies were deprived of operating revenues from approximately 1,500 natural gas meter customers in the local area and as of the date of the Commission's final ruling in this case, their total losses were approximately $225,000. (J.A. 28). The record before the Court shows that the demanded refund will total more than $62,000., including interest through the appropriate date in 1970, and that the forced payment of such amount would almost completely deplete petitioner's retained earnings of $65,500. (J.A. 48). Indeed, the record shows that, in 1968, petitioner realized only $2,386. in net profits on its natural gas sales, and, in 1967, it actually lost $12,436. on its said sales, 91% of which were made to Tennessee (J.A. 49).

The Commission nevertheless initially refused to grant any stay of its refund order in this case. It reconsidered, however, and granted a stay only after petitioner filed a motion for that relief in this Court.

POINT I

The Federal Power Commission Has No Authority To Impose Sanctions or To Compel the Payment of a Penalty in a Case of This Kind. Its Refund Order, Intended Solely To Penalize Petitioner for Failing To File Its Contractual Rate Increase in 1964, Is Thus a Nullity

When Congress passed the Administrative Procedure Act in 1946, it expressly provided in Section 9(b), under the heading "*Imposition of Sanctions*" (5 U.S.C. § 558):

> "(b) A sanction may *not* be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law."

And, at 5 U.S.C. § 551 (10), Congress defined the word "*sanction*" as follows:

> "*Sanction* includes the whole or a part of an agency—
>
> (A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;
>
> (B) withholding of relief;
>
> (C) *imposition of penalty or fine;*
>
> (D) destruction, taking, seizure, or withholding of property;
>
> (E) *assessment of damages, reimbursement, restitution, compensation, costs, charges or fees;*
>
> (F) requirement, revocation, or suspension of a license; or
>
> (G) *taking other compulsory or restrictive action.*" (Italics Supplied)

Thus, absent a *specific* statutory provision delegating to the Federal Power Commission the right to impose a "*sanction*" or a "*penalty or fine*", or a "*reimbursement or restitution order*" on petitioner *solely because it failed to file its contractual price increase in 1964 under Section 4 of the Natural Gas Act,* we submit the Commission has

no such authority and that its refund order in this case is an *absolute nullity.* In this regard, when the Administrative Procedure Act was before the Congress in 1946, Congressman Walter, Chairman of the House Judiciary Subcommittee which reported the bill, explained the meaning of the "*Imposition of Sanctions*" section on the floor of the House as follows (*Cong. Record, Vol. 92, Part 5, pg. 5654, 79th Cong. 2nd Session, 5/24/46*):

> "The first and principal provision of the section simply requires that no sanction shall be imposed . . . except within jurisdiction delegated to the agency and as authorized by law. This provision is framed on the necessary assumption that the detailed specification of powers must be left to other legislation relating to specific agencies. *Its effect is to confine agencies to the jurisdiction and powers so conferred.* That means not only the legal but the factual jurisdiction of an agency, *and the legal and factual appropriateness of any sanction or relief it may assume to impose or grant. The basic premise of the section, if I may repeat, is that agencies are not authorized to invent sanctions or relief or to attempt to apply or grant them beyond the limitations of authority within which they operate.*" (Italics supplied)

It has thus been held repeatedly, of course, that the Federal Power Commission has no authority whatsoever under either the Natural Gas Act or the Federal Power Act, to impose sanctions in the form of penalties, fines, or reparations orders (*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 254, 258 (1951); *Atlantic Refining Co.* v. *Federal Power Commission,* CCA, D.C. 1963, 316 F.2d 677, 679; *United Gas Improvement Co.* v. *Callery Properties, Inc.,* 382 U.S. 223, 229 (1965)). In *Hope Natural Gas Co., supra,* the Supreme Court stated, at page 618:

> "It is conceded that under the (Natural Gas) Act the Commission has no power to make reparation orders."

And, in *Montana-Dakota Utilities Co., supra,* the Supreme Court explained that under the Federal Power Act, administered by the Commission along with the Natural Gas Act, Congress expressly "withheld from the Commission the power to grant reparations" (341 U.S. 246, 254). The situation was explained by Mr. Justice Frankfurter in his dissenting opinion as follows, at page 258:

> "Federal railroad rate legislation gave such a power to the Interstate Commerce Commission. Act of Feb. 4, 1887, §§ 9, 16, 24 Stat. 382, 384, 385 . . . *But it was not given to the Federal Power Commission. It was withheld deliberately.* See *Sen. Rep. No. 621, 74th Congress, 1st Session 20.* Wholesale consumers of electric energy were apparently considered, as a rule, adequately protected by the provisions of the Act authorizing the Commission *to grant prospective relief and, in certain circumstances, to order refunding of sums accumulated during the pendency of rate proceedings . . . Despite the unqualified statutory declaration that unreasonable rates are unlawful, we think it clear that Congress did not intend either court or Commission to have the power to award reparations on the ground that a properly filed rate or charge has in fact been unreasonably high or low . . .*" (Italics supplied)

It is true, of course, that *in rate proceedings* under Section 4 of the Natural Gas Act (15 U.S.C. § 717c), Congress did prescribe a definite statutory procedure which the Commission may follow in certain cases to an ultimate refund order. Under that procedure, if a natural gas company files a proposed rate increase which the Commission wishes to suspend, it may be suspended under Section 4(e) of the Act, but for only 5 months, at which time the rate becomes effective. If, at that time, the proposed new rate is still the subject of a Commission hearing, the Commission may require the company involved to furnish a bond pursuant to which it undertakes "to refund any amounts ordered by the Commission" to be refunded at the end of the continuing investigation of the rate about to become temporarily effective. If the Commission there-

after finally rules that the rate, which became temporarily effective in the manner described, is unjust or unreasonable, then the Commission may order a refund of the excess charges collected during the period from the date on which the rate became temporarily effective to the date of the Commission's final order after completion of the hearing process. Obviously, the very limited, very specific refund authority prescribed by Section 4 of the Act has no application to the power attempted to be exercised by the Commission in the case at bar. Primarily, of course, this is not a rate case under Section 4 of the Act and none of the statutory procedures prescribed by Section 4 have been followed or applied by the Commission in this instance. In addition, since the Commission has affirmatively ruled that petitioner's rates, both immediately before and after the asserted refund period, were absolutely *"just and reasonable"*, the Commission's authority to order a refund under Section 4 could not lawfully be brought into play because, under that section, only amounts specifically found "not justified" may be the subject of a refund order.

It is also true that in recent *certificate proceedings* under Section 7 of the Natural Gas Act (15 U.S.C. § 717(f)), courts in the federal system have construed Section 7(e) of the Act (15 U.S.C. § 717f(e)) to be broad enough to authorize the Commission to impose limited refund orders on applicants for certificates in cases where the applicant originally obtained an *"emergency, temporary certificate"* or a permanent certificate from the Commission under Section 7 at a prescribed or prevailing price level only to have the Commission thereafter find that the "emergency temporary price" thus charged or authorized was unjust and too high (*Public Service Commission of New York* v. *Federal Power Commission,* C.C.A., D.C. 1964, 329 F.2d 242, cert. denied, 84 S.Ct. 1644 (1964); *Federal Power Commission* v. *Sunray DX Oil Co.,* 391 U.S. 9 (1968); *United Gas Improvement Co.* v. *Callery Properties, Inc.,* 382 U.S. 223 (1965); *Federal Power Commission* v. *Hunt,* 376 U.S. 515;

Continental Oil Company v. *Federal Power Commission,* C.C.A. Tex., 1967, 378 F.2d 510, cert. denied, 391 U.S. 917; *Skelly Oil Co.* v. *Federal Power Commission,* C.C.A. 10, 1968, 401 F.2d 726). Those decisions, of course, are grounded on that portion of Section 7(e) of the Act which authorizes the Commission "to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require"; and in its decision in *Sunray DX Oil Co., supra,* the Supreme Court defined the scope of the Commission's authority in this regard as follows, at 391 U.S. 9, 45:

> ". . . we hold that in the exercise of its power to condition permanent certificates under § 7(e), the Commission may require producers *to refund amounts collected under outstanding, unconditioned temporary certificates in excess of the finally established in-line price.*" (Italics supplied)

The Supreme Court was particularly careful in *Sunray DX Oil Co.,* however, to make it clear, at page 24 of its decision, that *"the Commission has no reparation power" and that it has no authority to attach conditions to certificates which would amount to a sanction, penalty or reparation order not specifically authorized by the Natural Gas Act* (See 391 U.S. 9, 24).

Essentially, therefore, the Commission concededly has two separate *refund authorities* under the Act and *two only,* as follows:

1) The Commission has the right to order a refund in a Section 4 rate proceeding, *if after allowing a rate temporarily to go into effect, the Commission finds that rate to be unreasonable or unjustified;* and

2) The Commission has the right to order a refund in a Section 7 certificate proceeding, if again, *after it allows a rate temporarily or permanently to go into effect, it finds from the evidence before it that the said*

rate is unreasonable, unjustified or out-of-line with the rate it finally establishes to be "in-line" or proper in that same or in a related certificate proceeding.

It is simultaneously clear, however, that the Commission enjoys no other "*sanction*" authorities under the Act, *and that accordingly, it has no statutory power whatsoever to order a refund or to assess a penalty, a fine or a restitution order solely because it finds that an applicant in a Section 7 proceeding before it unintentionally failed to file notice of a rate increase under Section 4 several years before when the applicant had good, sound reason to believe it was then not subject to any of the provisions of the Natural Gas Act.* The Commission has not pointed to any provision of the Natural Gas Act which gives it any such authority and a reading of the Act will, we submit, convince the Court that the Commission has no such authority. *That conclusion is especially compelling, petitioner contends, in a case such as this one where the Commission has affirmatively ruled that all of petitioner's contract rates over the years back to 1961 (indeed back to 1956) have been fair, reasonable, acceptable, justified or warranted.*

In conclusion, therefore, this case presents the ugly picture of what Congress really sought to avoid in 1946 when it prescribed in Section 9 of the Administrative Procedure Act that "a sanction may not be imposed . . . except . . . as authorized by law"; and it typifies what the House Report in support of Section 9 intended to avoid when it stated that "agencies are *not* authorized *to invent sanctions . . . or to attempt to apply . . . them beyond the limitations of authority within which they operate*". Here, we have a case where the Commission has affirmatively ruled that over the years back to 1961, petitioner's rates have always been and still are today just, reasonable, acceptable, warranted, or in-line. The Commission thus concedes that it had no statutory authority whatsoever to reject those rates or to order that any excessive charges be refunded because there

were no excessive charges. Lacking such refund power under the Act both then and now, the Commission did nothing less than *"invent a sanction"* and to proceed *"beyond the limitations of authority under which it lawfully operates"* when it acted to penalize and fine petitioner in the form of a refund order for innocently failing to file a rate notice in 1964, when petitioner still had just cause to believe it was not subject to the Act administered by the Commission. That *"invented sanction"*, we submit, is an absolute nullity which must be rejected by this Court.[8]

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[8] Assuming *arguendo* the Commission honestly believed petitioner had "willfully and knowingly" omitted to file the 1964 rate notice, the Commission's remedy under the statute written by Congress was under Section 21 of the Act (15 U.S.C. § 717t) which prescribes "General Penalties", including "fines" for such behavior. Under Section 22 of the Act, however, the District Courts, not the Commission, have jurisdiction of such offenses (15 U.S.C. 717u). The Act makes no provision whatsoever for any "fine" or "penalty" to be assessed by the Commission for alleged violations of the Act.

POINT II

The Commission's Sole Rate-Fixing Authority Under the Natural Gas Act Is To Determine Whether Contract Rates Are Just and Reasonable. Absent a Finding That a Rate Is Unreasonable, the Commission Has No Statutory Authority To Modify the Rate, To Reduce It or To Direct That a Refund Be Made. And, If the Commission Endeavors To Force a Refund Without Making the Statutory Finding of Unreasonableness, It Exceeds Its Authority Under the Act and It Deprives Applicants Such as Petitioner of Their Property Without Due Process of Law in Violation of the Fifth Amendment

In *Colorado Interstate Gas Co.* v. *Federal Power Commission*, C.C.A., 10, 1944, 142 F.2d 943, 954, affd. 324 U.S. 581, rehearing denied, 325 U.S. 891, it was held, at 142 F.2d 943, 954:

> "The passage of the (Natural Gas) Act did not automatically overthrow the contracts into which . . . companies had previously entered. Neither did it ipso facto set aside the schedule of charges upon which they had agreed. *Such rates and charges could be modified only after an express finding of unreasonableness.* Wichita R. and Light Co. v. Public Utilities Commission, 260 U.S. 48 . . . And the right of the Commission to make a finding of unreasonableness depends upon the existence of the fact. *In the absence of substantial evidence to show that rates and charges in existence are unreasonable, a finding to that effect constitutes the arbitrary exercise of power by administrative fiat and cannot stand.* Interstate Commerce Commission v. Louisville & N.R. Co., 227 U.S. 88 . . ." (Italics Supplied)

In *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 583, the Supreme Court, while in the course of considering the constitutionality of the Natural Gas Act, stated that the first prerequisite to an order by the Federal Power Commission providing for a reduction in natural gas rates or a refund of such rates is that it shall be preceded by a hearing *and* by *specific findings on that*

subject. And, in *Sunray Mid-Continent Oil Company* v. *Federal Power Commission,* CCA 10, 1959, 270 F.2d 404, 408, 409,, the same general rule was expressed in constitutional terms by the court which ruled that the Commission's orders under the Natural Gas Act are sustainable only if they are *"in accord with the provisions of the Act and . . . meet the test of Constitutional due process".*

Under Section 4 of the Natural Gas Act, the only statutory requirement regarding rates is that they *"shall be just and reasonable",* and only rates that are *not "just and reasonable"* are *"declared to be unlawful"* (15 U.S.C. 717c(a); See *Federal Power Commission* v. *Hope Gas Co.,* 320 U.S. 591, 600). Under Section 4(e) of the Act, the Commission's rate- reduction and rate refund authority is thus automatically expressly limited to those rates which, after hearings, are found to be *"not justified"* (15 U.S.C. § 717c(e)).

Similarly, under Section 5 of the Act, the Commission's only rate-fixing authority is to determine, after hearings, whether a rate is *"unjust, unreasonable, unduly discriminatory, or preferential"* (15 U.S.C. § 717d(a)). The Commission, having made that statutory finding, is then authorized to fix *"the just and reasonable rate".* And, of course, as was demonstrated in Point I of this brief, the decisions under Section 7 of the Act hold that the Commission's rate-fixing authority in certificate cases (as distinguished from rate cases) again covers only the right to "attach to the issuance of the certificate . . . *reasonable terms and conditions",* i.e., where rates are involved, *a reasonable rate* to be charged by the certificate holder, which rate might be lower than a temporary rate theretofore approved by the Commission, in which event the Commission may order a refund of the difference between the higher temporary rate and the *reasonable lower rate* finally fixed by the Commission (*Public Service Commission of New York v. Federal Power Commission, supra; Federal Power Commission* v. *Sunray DX Oil Co., supra; Federal*

Power Commission v. *Hunt, supra; United Gas Improvement Co.* v. *Calley Properties, Inc., supra; Skelly Oil Co.* v. *Federal Power Commission, supra.*

As stated in *Colorado Interstate Gas Co., supra,* therefore, the one factor common to all rate-fixing and certificate proceedings under the Act is that a rate may be rejected, reduced, modified or made the subject of a refund order only if and when the Commission, after a hearing, makes *"an express finding of unreasonableness"; and without such a finding (or in the absence of substantial evidence to support such a finding), the Commission may not lawfully or constitutionally order a rate refund or a rate reduction.* And, of course, in cases where an administrative agency such as the Power Commission issues an order which lacks the necessary statutory findings or which contains findings not supported by substantial evidence, 5 U.S.C. § 706, another provision of the Administrative Procedure Act, directs the reviewing court to declare the agency action unlawful and to set aside all actions and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right; (3) in excess of statutory jurisdiction; or (4) unsupported by substantial evidence.

In the case at bar, the Commission failed to make any finding that petitioner's rate to Tennessee during the period from November, 1964 to July 27, 1966 was "unreasonable". On the contrary, in its Opinion No. 572-A, the Commission went the whole way back to 1961 and ruled petitioner's price at that time was *"acceptable"* and wholly in line with the price it had set for producers in petitioner's area of Louisiana (J.A. 15). Likewise, the Commission found that petitioner's rate to Tennessee on July 29, 1966 was *"justified"* (J.A. 16, 17). *That rate, of course, was the very same rate which governed sales from petitioner to Tennessee during the period from November, 1964 to July 28, 1966* (J.A. 35). *Ergo,* if that same rate was "justified" on July 29, 1966, it was similarly "justified" on July 28, 1966,

on July 1, 1966 and back through November, 1964. *This necessarily follows since in its Opinion No. 572-A, the Commission admitted that as early as 1961, more than three years prior to November, 1964, it had authorized a "producer price" in petitioner's area of 20¢ per MCF,* whereas, from 1964 through 1969, *three to eight years later, petitioner's price to Tennessee was only 19¢ per MCF* (J.A. 15); *Union Texas Petroleum,* 32 FPC 254 (1964), plus a necessary charge for Louisiana taxes.

Clearly, therefore, the Commission's refund order in this case must be set aside under 5 U.S.C. § 706 because it is arbitrary, capricious, unsupported by substantial evidence, and because it is not in accord with those provisions of the Natural Gas Act which require evidence and an express finding of "unreasonableness" before a contractual rate may be reduced or made the subject of a refund order. And finally, of course, to the extent the Commission's order seeks to force a refund without any supporting evidence of price unreasonableness and without the required statutory finding of price unreasonableness, it violates petitioner's rights under the Fifth Amendment (*Pure Oil Company* v. *Federal Power Commission,* CCA 7, 1961, 292 F.2d 350; *Sohio Petroleum Company* v. *Federal Power Commission,* CCA 10, 1961, 298 F.2d 465; *California Oil Company* v. *Federal Power Commission,* CCA 10, 1963, 315 F.2d 652, 655, 656).

POINT III

It Was Arbitrary and Capricious Under the Facts of This Case for the Commission To Refuse To Extend Its Excuse of Petitioner's Failure To Apply for a Certificate Through the Date of the Supreme Court's Decision in Lo-Vaca Gathering Company in 1965

In its Opinion No. 572-A, the Commission ruled (J.A. 15):

> "In our view, Plaquemines may reasonably be excused from its failure to seek a certificate from us, and to file its rate, prior to our own decision in *Lo-Vaca Gathering Company*, 26 FPC 606 (1961). As we have observed in connection with independent producers, "the doctrine of that case may not have been predictable . . . The Producers might have felt, with some reason, that gas could have been isolated from the jurisdictional gas by contractual means". *Hugoton Production Company*, 41 FPC 490 (1969). . . . We have in this situation refrained 'as a matter equity, from requiring refunds for periods prior to 1961, and we do so here."

Based on that ruling, of course, the Commission excused petitioner from not filing its initial 1956 rate to Tennessee under Section 4 of the Act and for not filing its November, 1959 rate increase which continued to be effective through October 31, 1964 (J.A. 35).

But, under the facts of this case, it was plainly arbitrary and capricious for the Commission not to extend its ruling excusing petitioner's failure to seek a certificate and to file its rates *through January 8, 1965* when the Supreme Court rendered its decision in *Lo-Vaca Gathering Company* v. *Federal Power Commission, supra.* The Commission arbitrarily refused to do so, contending that petitioner should have been *"on notice"* after the Commission's 1961 *Lo-Vaca* decision that (J.A. 30)—

> "certain of (its) sales might be jurisdictional".

That holding by the Commission, of course, completely ignores the fact that, on September 24, 1963, the United

States Court of Appeals for the Fifth Circuit *flatly vacated the Commission's 1961 order in Lo-Vaca* and ruled that the commingling of natural gas not otherwise subject to the jurisdiction of the Federal Power Commission in gas lines of a natural gas company with gas which was 'jurisdictional' does not destroy the *'non-jurisdictional'* status of the gas which was not originally subject to the jurisdiction of the Federal Power Commission.

Thus, from 1961 through January 8, 1965, when the Supreme Court ultimately and finally adopted the Commission's position in *Lo-Vaca,* petitioner *was not "on notice"* that is was required to file either its rates or an application for a certificate with the Commission with respect to its sales to Tennessee.

Indeed, when the time arrived in November, 1964 for petitioner to increase its contractual rate to Tennessee under the 1956 agreement (J.A. 35), the Court of Appeals' decision in *Lo-Vaca* was the prevailing law on the subject of petitioner's obligation to file with the Commission, and that decision stated that petitioner's sales to Tennessee were still *"non-jurisdictional"* as far as its obligations to the Federal Power Commission were concerned.[9]

In conclusion, therefore, if this Court agrees with petitioner's position on this particular point and thus extends the Commission's "excuse" of petitioner's failure to file through January 8, 1965, the date of the Supreme Court's decision in *Lo-Vaca,* it follows, as day follows night, that the Commission's refund order herein must fall. The reasonableness and propriety of such relief is underscored by the fact that the Commission itself did not ask petitioner to file for a certificate until after the Supreme Court's decision in *Lo-Vaca,* when, in truth and in fact, it became

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[9] In fact, on December 17, 1963, the Court of Appeals denied a rehearing in *Lo-Vaca* (323 F.2d 190) and argument was not had in the Supreme Court *until November 17, 18, 1964, after petitioner's rate increase became effective on November 1, 1964* (See 379 U.S. 366).

clear for the first time that exclusively intrastate sales such as petitioner's "might" be subject to the Commission's jurisdiction.

Under all of these circumstances, therefore, we strenuously urge the Court to hold that petitioner's failure to file its 1964 rate increase with the Commission was just as excusable as its failure to file its initial 1956 rate and its 1959 price increase, actions which the Commission has already excused "in equity". And, since Section 7(e) of the Natural Gas Act (15 U.S.C. 717f(e)) limits the Commission's power to attach conditions to certificates to "reasonable conditions", it was thus plainly arbitrary and unreasonable for the Commission in this case to base a refund order condition under Section 7(e) solely on petitioner's excusable failure to file the 1964 rate increase.

POINT IV

Under the Facts of This Case, It Was Inequitable, Unreasonable and Confiscatory for the Commission To Insist Upon a $62,000. Refund When Petitioner's Net Worth Is Only a Little More Than That Amount, and When the Record Before the Commission Showed (1) Petitioner Was Alternately Suffering Losses and Very Small Profits on Its Sales to Tennessee and (2) Petitioner Had Just Suffered Crushing Losses in the 1969 Hurricane

In *Public Service Commission of New York* v. *Federal Power Commission,* CCA, D.C. 1964, 329 F.2d 242, cert. denied, 84 S.Ct. 1644, this Court ruled, at page 250:

> "The existence of the (refund) power, however, does not mean that its exercise is mandatory . . . Here, we follow the standard adopted by the Commission, namely, the standard of equity—*that is, the issue of a refund . . . turns upon equitable considerations . . .*" (Italics supplied)

And, as stated before, the Commission's power to attach "*conditions*" to a certificate in a Section 7 certificate proceeding is limited by Section 7(e) itself to the imposition of "*reasonable terms and conditions.*"

What, may we therefore ask, is "equitable" or "reasonable", in light of the facts here involved, about a $62,000. refund order when petitioner's entire net worth is only $66,500. (J.A. 48); when petitioner *lost* $12,436. on its gas sales in 1967 and earned only $2,386. on those sales on 1968 (J.A. 49); and when petitioner and its small affiliate, Delta Gas, lost approximately $225,000. in the 1969 hurricane which struck Plaquemines Parish, Louisiana (J.A. 28)?

Such a requirement, we submit, is so patently unreasonable and so clearly inequitable as to constitute an arbitrary abuse of discretion on the part of the Commission—an action which should be set aside by this Court under the provisions of Title 5 U.S.C. § 706(2) and as violative of Title 15 U.S.C. § 717f(e) which, as stated above, limits the

Commission's power in such cases to the imposition of "reasonable terms and conditions" only.

Rejection of the Commission's refund action is especially appropriate when the *"equitable considerations"* here involved are balanced and weighed. Enforcement of the Commission's order would almost surely destroy petitioner (J.A. 28); and it threatens to leave those who depend on petitioner for their gas supplies without a source of supply which they have enjoyed, at just and reasonable prices, since 1956 (J.A. 28). Dissolution of the Commission's $62,000. refund order, on the other hand, would have no appreciable effect on either Tennessee or on the millions of gas consumers who purchase gas directly or indirectly from Tennessee (J.A. 27). Indeed, the Commission itself has characterized petitioner's overall sales of gas to Tennessee as *"minimal"* in both *"size and impact"* (J.A. 15).

CONCLUSION

The Commission's refund orders in this case should be vacated and set aside.

Respectfully submitted:

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26-4

BRIEF FOR RESPONDENT
FEDERAL POWER COMMISSION

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 24550

Plaquemines Oil and Gas Company, Petitioner,

v.

Federal Power Commission, Respondent,

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL POWER COMMISSION

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JANUARY 1971

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24550

Plaquemines Oil and Gas Company, Petitioner,

v.

Federal Power Commission, Respondent

On Petition to Review an Order
of the Federal Power Commission

BRIEF FOR THE FEDERAL POWER COMMISSION

COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether the Commission, in issuing a certificate to a natural gas company which had commenced service without authorization, has the power to order refunds for the purpose of achieving, to the extent possible, retrospective compliance with the Natural Gas Act by the company prior to its application.

2. Whether the Commission's order that Plaquemines make refunds is reasonable.

This case has not previously been before this Court.

COUNTERSTATEMENT OF THE CASE

Plaquemines Oil and Gas Company challenges the Commission's orders granting it a certificate of public convenience and necessity to continue sales of gas commenced without authorization, to the extent they require the refund of certain amounts collected by the company during the period it was making jurisdictional sales to Tennessee Gas Pipeline Company without the requisite certificate authorization.

Plaquemines is a small family-owned company doing business in the Mississippi Delta region of Southern Louisiana (J.A. 3). It buys natural gas in Louisiana and sells it in Louisiana to Tennessee (J.A. 3). This gas is transported to its delivery point by Plaquemines' affiliate, Delta Gas, Inc., which operates a pipeline wholly within Louisiana (J.A. 3). Gas sold by Plaquemines and transported for its account to Tennessee's pipeline by Delta is commingled with other Tennessee gas, a substantial portion of which is destined for resale in interstate commerce. While the Plaquemines-Tennessee contract has a recitation that the gas is to be used for compressor fuel, this type of sale, where "restricted use" gas is concededly part of the commingled sale-for-resale stream of gas, was found to be within the Commission's jurisdiction by Lo-Vaca Gathering Co., 26 FPC 606 (1961), set aside, Lo-Vaca Gathering Co. v. F.P.C., 323 F. 2d 190 (CA5, 1963), Commission affirmed sub nom. California v. Lo-Vaca Gathering Co., 379 U.S. 366 (1965).

Plaquemines has been making sales of gas in interstate commerce to Tennessee pursuant to a contract dated June 14, 1956, but did not apply for a certificate until June 27, 1966 (J.A. 13,16). On February 26, 1970, the Commission, after hearings and an examiner's decision, issued Opinion 572 (J.A. 3, 43 FPC 242), granting Plaquemines an unconditioned certificate.

In response to an application for rehearing by the New York Public Service Commission (J.A. 9), the Commission modified its earlier action to require Plaquemines to make refunds of one cent per Mcf for natural gas sold by Plaquemines to Tennessee during the period beginning November 1, 1964, and ending July 28, 1966 (Opinion 572-A, J.A. 12, 43 FPC 620). The Commission reiterated its view first expressed in Opinion 572 that, although the record did not contain the full cost evidence normally included in a rate case, there was sufficient evidence for the Commission's conclusion that Plaquemines' current 20.5-cent rate was justified (J.A. 12-13). With respect to the New York claim that all amounts in excess of the initial contract rate of 18.5 cents being charged in 1956 should be refunded, the Commission found (J.A. 17) that (1) Plaquemines' failure to seek a certificate and to make rate increase filings prior to the Commission's <u>Lo-Vaca</u> decision in 1961 was excusable; (2) Plaquemines' price of 19.5 cents collected in 1961, in accordance with the contract price escalation provision (J.A. 35), would have been approved at that time as justified by the public convenience and necessity; (3) the one-cent escalation in price to 20.5

cents in November 1, 1964, could not be considered as a legal rate until Plaquemines made its filing in June, 1966; (4) Plaquemines would be required to refund one cent per Mcf for sales to Tennessee from November 1, 1964, until the company made a certificate filing with the Commission in 1966 giving public notice that it was charging 20.5 cents per Mcf; and (5) the record supported a finding that 20.5 cents per Mcf was warranted on and after July 29, 1966.

Plaquemines' subsequent application for rehearing (J.A. 18-29) was denied in Opinion 572-B (J.A. 29, 43 FPC 944). Plaquemines filed its petition for review on August 17, 1970, seeking to vacate and set aside the Commission's refund order.

ARGUMENT

I. THE COMMISSION HAD FULL AUTHORITY TO ORDER THE REFUNDS REQUIRED HERE

Petitioner essentially argues (Br. pp 13-19) that the refund order was beyond the Commission's express authority and hence was an impermissible sanction. It seems clear, however, that the Commission's action was well within its authority to impose reasonable terms and conditions in the exercise of its Section 7 certificate authority as complemented by its general authority under Section 16 of the Natural Gas Act to issue such orders "as it may find necessary or appropriate to carry out the provisions of [the Act]."

The need for the Commission's refund order resulted from Plaquemines' initiation and continuation of a jurisdictional sale of gas for resale without obtaining the necessary certificate approval pursuant to Section 7 of the Act and its related non-compliance with the rate-filing provision of Section 4. In the Commission's view the refunds are required to recreate a situation reflecting, to the extent possible, compliance with the Natural Gas Act. The Commission's authority in acting on certificate applications to order refunds for such remedial purposes is well established. Thus, in United Gas Improvement Co. v. Callery Properties, Inc., 382 U.S. 223 (1965), and F.P.C. v. Sunray DX Oil Co., 391 U.S. 9 (1968), the Commission's implied authority to order refunds in certificate cases of amounts collected in excess of finally certificated rates was approved, although in those cases the sales had been initiated with Commission approval that did not impose any express refund obligations. In Callery, sales at wholesale commenced under unconditioned permanent certificates that later were successfully challenged on court review. On remand, the Commission found that the initial rates should have been conditioned to a lower price than had been collected, and refunds were ordered of the difference. In Sunray, the sales were commenced under unconditioned temporary certificates, issued without public notice or hearing, at prices that were subsequently found out-of-line in permanent certificate proceedings; again the Commission's order requiring

refunds of the difference between the amount collected and the initial permanent certificate price, without any Commission determination that rates collected were just and reasonable, was sustained. In both cases, the Commission and the courts rejected producer contentions that the refunds in those cases that were necessary to restore compliance with the Gas Act constituted reparations not authorized under the Natural Gas Act.

This Court's construction of comparable provisions of the Federal Power Act in Niagara Mohawk Power Corp. v. F.P.C., 126 USAppDC 376, 379 F. 2d 153 (1967), shows that the Commission's power to recreate the past to reflect compliance with such an Act is at least as great where no attempt at compliance had even been made by the company. See also Central Maine Power Co. v. F.P.C., 345 F. 2d 875 (CA1, 1965). Moreover, in Niagara Mohawk this Court expressly rejected the contention which petitioner here reasserts (Br. pp. 13-19), that orders achieving compliance with the monetary obligations under a governing statute for the period prior to obtaining needed certificate or licensing authority are imposing penalties.

These cases make clear that the test for determining the validity of a refund order in a certificate or licensing case is its reasonableness. Contrary to petitioner's claim (Br. pp. 20-23), this does not require any finding that the excessive rates collected were unjust or unreasonable. Indeed, in Callery the Supreme Court, over Justice Harlan's

dissent, expressly affirmed the Commission's conclusion that the ordering of refunds did not have to await such a determination. This meant of course that the producers in that case were held to the initial certificate price determined by the Commission years after commencement of service even though they might have had an opportunity to file for and justify as just and reasonable increased rates above that price if the Commission had not erred in its original certificate order. The use of the certificate price as the measure of ordering refunds was conceded in Sunray. Accordingly, in those cases refunds were required because the initial level of the rates collected was unjustified, not because of any findings that such rates necessarily continued to be excessive.

Petitioner is also incorrect in claiming (Br. pp. 21-23) that the Commission in rate cases may order refunds only upon a finding of unjustness and unreasonableness. Thus, for example, in Shell Oil Co. v. F.P.C., 334 F. 2d 1002 (CA3, 1964), the refunds pursuant to Section 4(e) of contractually unauthorized increases were sustained. See also Pan American Petroleum Co. v. F.P.C., 116 USAppDC 249, 322 F. 2d 999 (1963). Moreover, in Jupiter Corp. v. F.P.C., 137 USAppDC 295, 424 F. 2d 783 (1969), certiorari denied, 397 U.S. 937 (1970), this Court sustained the Commission's order pursuant to Section 16 of the Act, infra, p. 18, requiring Jupiter to refund amounts collected in excess of previously prescribed rates, see 137 USAppDC at 300, 303, 424 F. 2d at 788, 791. The Commission's

authority is certainly no less in fashioning an order in a certificate case where service had been initiated without the requisite Commission authority.

II. THE IMPLEMENTATION OF THE COMMISSION'S REFUND POLICY WAS REASONABLE

A consideration of the facts shows that the limited refunds required here represent an eminently reasonable exercise of the Commission's authority.

A. In 1956 Plaquemines commenced its sale of gas to Tennessee without seeking certificate approval apparently because the contract specified that the gas would be used as compressor fuel even though Plaquemines' gas was to be commingled with Tennessee's other supplies. Prior to 1961 the Commission had declined to exercise jurisdiction in possibly comparable situations, but in Lo-Vaca Gathering Co., 26 FPC 606 (1961), the Commission, in response to requests for disclaimers of jurisdiction, definitively held that jurisdiction under the Gas Act followed the facts of flow and could not be avoided by artificial use designations in contracts. This jurisdictional interpretation was disapproved by the Fifth Circuit in 1963 (323 F. 2d 190) but sustained by the Supreme Court in California v. Lo-Vaca Gathering Co., 379 U.S. 366, in January, 1965. After prodding from the Commission, Plaquemines finally applied for a certificate in June, 1966.

In granting a certificate for the requested sale, the Commission concluded that certificate authorization should have been sought no later than its 1961 Lo-Vaca

decision. Certainly by that time it was clear that any company with a sales contract like those involved in Lo-Vaca was acting at its peril in ignoring Commission jurisdiction. On the other hand, the Commission, as it had done in several earlier cases involving uncertificated "restricted use" contracts (see Hugoton Production Co., 41 FPC 490 (1969), petition for review pending on other grounds sub nom. Mesa Petroleum Co. v. F.P.C., CA5 No. 28229 (1970)), excused the failure to file prior to that time because of the Commission's own indecision. Accordingly, the Commission found that starting from 1961 the situation should be restored to the extent possible to reflect a situation involving compliance with the requirements of the Natural Gas Act. This meant that the 19.5-cent price being charged in 1961 would be viewed as an initial price subject to approval under Section 7 certificate standards. Since the Commission concluded (J.A. 15) that it probably would not have imposed any price reduction condition with respect to the 19.5-cent price in 1961, the charges at that rate were allowed to stand.

But the Commission concluded that it could not reasonably leave unaltered collection of the increased rate of 20.5 cents for the period from November, 1964, through July, 1966, since for that period there had not even been a colorable compliance with the rate increase filing provision of Section 4(d) of the Act. That Section requires any natural gas company proposing a rate increase to give 30 days' prior notice. Such notice is required even when a contract on

file with the Commission as a rate schedule calls for rate increases at specified times. See, e.g., Sunray Mid-Continent Oil Co. v. F.P.C., 364 U.S. 137, 153 (1960). Compliance with this requirement for prior notice for rate increases has been strictly construed.

For example, in Socony Mobil Oil Co. v. Brooklyn Union Gas Co., 299 F. 2d 692 (CA5), certiorari denied, 371 U.S. 887 (1962), several producers had obtained judicial stays of the Commission order requiring producers to make filings as natural gas companies effective June 7, 1954, and these producers collected rates higher than those in effect on that date without making any Section 4(d) rate increase filings. The producers lost the judicial review proceeding and the stay was dissolved. Thereafter, the distribution companies that bore the cost of the unauthorized rate increases obtained restitution of the excess collections, the Fifth Circuit holding that the stay granted the producers did not provide any basis for permitting retention of rates not filed for in conformity with Section 4 of the Gas Act. Similarly, in Shell Oil Co. v. F.P.C., 334 F. 2d 1002 (CA3, 1964), the court sustained the Commission's view that a rate increase collected during a past period without authorization could not properly be supported by a later, substitute agreement between seller and buyer. The Commission was equally justified in refusing to approve Plaquemines' rate increase for a period when it made no attempt to comply with any of the provisions of the Gas Act.

B. Petitioner's assertion (Br. pp. 22-23) that such a result is unreasonable because the Commission found its rates just and reasonable for the entire period from 1961 on is thus not only irrelevant but also factually incorrect. For the Commission made it clear (J.A. 31) that the record is devoid of any support for the claim that Plaquemines' 20.5 cent rate was just and reasonable as of November, 1964, when the company started collecting that price. Indeed the reasonableness of the Commission's order is emphasized when considered in the context of the Commission's disposition of all the issues. The Commission assumed (J.A. 15) that 19.5 cents per Mcf being charged in 1961 would have been found an acceptable rate had Plaquemines filed in 1961. The necessity to undertake costly proceedings to reconstruct what the Commission might have done in 1961 was thus averted (J.A. 16). In addition, the Commission has not required refunds for the period prior to its Lo-Vaca decision in 1961, on the theory that some confusion relating to the need to file existed before then. While this was reasonable, an earlier date would not have been unreasonable, particularly when it is recalled that the natural gas companies in the Lo-Vaca case itself sought a Commission ruling on its jurisdiction over contracts comparable to Plaquemines' before initiating service. Finally, the Commission treated Plaquemines' June 27, 1966, filing as sufficient to meet the increased rate filing requirements, although it was actually a

certificate application (J.A. 16, n. 1); and, in determining the effective date of the filing, the Commission assumed that a one-day suspension would have been ordered, although five months' suspension was customary. While not absolving Plaquemines entirely of its statutory obligations, the Commission has imposed no burden on Plaquemines more onerous than that borne by others in its class.

C. The Commission was also on sound ground in not extending its excuse of Plaquemines' failure to comply with the Act through the date of the Supreme Court's Lo-Vaca decision in January, 1965. Plaquemines apparently argues (Br. pp. 24-26) that judicial review of the Commission's decision created a hiatus which justified the company's inaction from 1961 to 1965. It is apparent, however, that Plaquemines, by ignoring the FPC after its 1961 decision in Lo-Vaca, was merely taking a chance that the Commission's decision would be overruled on review, just as the producers had done in Socony Mobil, supra. While the pendency of judicial review might show that Plaquemines was not in wilful defiance of the Act, it in no way nullified the notice effect of the Commission's Lo-Vaca decision. Thus, the Commission properly held (J.A. 30), as in Hugoton Production Co., 41 FPC 490 (1969), supra, p. 9, that its Lo-Vaca decision put companies such as Plaquemines on notice that their sales might be jurisdictional. In Hugoton where the company began making jurisdictional sales without certification in 1956, the

Commission had also, as here, excused the company's failure to apply for a certificate prior to 1961, but required refunds of charges in excess of the in-line price from 1961 to 1965, the date when Hugoton ceased deliveries. 41 FPC at 497. To require less of Plaquemines would be to ignore the well-publicized effects of the Commission's reading of the statute, promulgated in 1961 and judicially approved in 1965.

That the Commission did not communicate with Plaquemines until the Supreme Court's decision in Lo-Vaca had been handed down is not significant. Plaquemines seems to argue (Br. p. 25) that the lack of notification by the Commission justifies the company's inaction. No statutory provision, however, imposes a duty on the Commission to send such notification. As the Commission stated (J.A. 31):

> * * * Our 1966 invitation to Plaquemines that it file with us did not serve to commence Plaquemines' responsibilities under the Natural Gas Act. It served instead as a reminder that such responsibilities ought forthwith to be met. The requirements of the Natural Gas Act do not depend for their effectiveness upon the initiative of this Commission. * * *

The Act imposes the duty on a natural gas company to come forward at the appropriate time, and, failing that, to be ready (in the context of analogous provisions of the Federal Power Act) "to redress his default by discharging the duty he should by rights have assumed without nudging." Niagara Mohawk Power Corp. v. F.P.C. 126 USAppDC 376, 382, 379 F. 2d 153, 159 (1967).

Nothing which Plaquemines discusses in its brief is sufficient to justify overturning the Commission's order on the ground that Plaquemines' failure to comply with the Act in a timely manner is excusable. Again Niagara Mohawk is instructive. The anomalies brought about by Niagara Mohawk's failure to comply with the Federal Power Act in a timely manner were cured by backdating the license, a solution approved by the Court in the following language:

> * * * The effective date used by the Commission to measure the extent of petitioner's obligation under its license reflects an effective date of default that gives petitioner the benefit of any doubt. 126 USAppDC at 382, 379 F. 2d at 159.

We believe that the measure of Plaquemines' obligation chosen by the Commission is not any less appropriate and equitable.

D. Plaquemines' claim of hardship and arbitrariness (Br. pp. 27-28) is also not supported. On this point, Plaquemines seems to imply that its only means to raise funds is to liquidate its assets. Other obvious means of discharging the refund obligation may be suggested, such as borrowing, which Plaquemines has not shown it is unable to do. Moreover, if petitioner could show the need, partial payments over a period of time could be approved. However, cursory examination of Plaquemines' balance sheet (J.A. 48) reveals that the company would have more than enough cash to comply with the Commission's

order if a non-interest bearing note receivable from an officer and stockholder or the advance to an affiliated company were collected and the proceeds combined with cash on hand. In spite of Plaquemines' modesty in admitting profits, the company has accumulated a substantial retained earnings account in relation to the value of assets used in the business. Nothing discussed by Plaquemines (Br. pp. 27-28), including its alleged losses in the 1969 hurricane, is sufficient to make it inequitable, unreasonable, or confiscatory for Plaquemines to live up to its statutory obligations.

CONCLUSION

The order of the Commission should be affirmed.

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January 1971

APPENDIX

STATUTES INVOLVED

The Natural Gas Act, 15 U.S.C. §§717-717w (1963), provides in pertinent part:

Section 4 * * *

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective.

Section 4 (Continued)

If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 7 * * *

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided*, *however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

Section 7 (Continued)

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

Section 16

Sec. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. * * *

PETITIONER'S REPLY BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,550

PLAQUEMINES OIL AND GAS COMPANY, INC., *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

On Petition For Review of Orders of the Federal Power Commission

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v.

Federal Power Commission, *Respondent*

On Petition For Review of Orders of the Federal Power Commission

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PETITIONER'S REPLY BRIEF

PRELIMINARY STATEMENT

The Commission's brief concedes from the very outset that the sole purpose of the refund order in this case was to *penalize* or *fine* petitioner for its failure to file, in 1964, a rate increase established eight years before in its 1956 contract with Tennessee Gas Pipeline Company (Commission's Brief, pg. 5). The Commission concedes further that such refund order was entered by the Commission *without any prior finding that the 1964 rate increase was unjust or unreasonable, or that it was "out-of-line" with*

the "in-line" price established by the Commission for the area of Louisiana involved (Commission's Brief, pages 7, 8). Indeed, the Commission agrees on the very face of its brief that (Commission's Brief, pgs. 3, 4):

> (i) "Plaquemines' failure to seek a certificate and to make rate increase filings prior to the Commission's *Lo-Vaca* decision in 1961 was *excusable"*; and
>
> (ii) "Plaquemines' price of 19.5 cents collected in 1961, in accordance with the contract escalation provision, *would have been approved at that time as justified by the public convenience and necessity"*; and
>
> (iii) "the record supported a finding that (the one-cent escalation in price to 20.5 cents on November 1, 1964) was *warranted* on and after July 29, 1966."

The Commission also admits in its brief that the record is completely *devoid* of any finding or evidence that the said price of 20.5¢ per Mcf, *admittedly "warranted on and after July 29, 1966"*, was *not* warranted 21 months earlier on November 1, 1964, when it originally went into effect under the 1956 contract.

And, regarding the asserted legal basis for the Commission's refund penalty, the Commission concedes there is *nothing* in the Natural Gas Act itself which *expressly* authorizes or *specifically directs,* in circumstances such as those presented here, the Commission to enter a refund order *to punish* an applicant for having inadvertently failed to file a contractual rate increase in 1964 when, *at best,* the law was still *wholly unsettled* as to whether the said applicant was even subject to the Commission's jurisdiction.[1] Faced with that dilemma, the Commission contends in its brief that, *absent express penalty provisions* in the Natural Gas Act itself, the Commission still has the

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[1] In this regard, the Commission's brief openly concedes further that the Supreme Court's decision in the controlling case (*LoVaca*) was not available until 1965, more than two months after petitioner's 1964 price increase became effective (Commission's Brief, pg. 12).

"implied authority" to levy a fine in the form of a refund order because Section 16 of the Act gives the Commission the right to invent its own ideas as to what might be "appropriate to carry out the provisions of the Act" and, under Section 7 of the Act, it has the right to devise "reasonable conditions" for attachment to the certificates it issues (Commission's Brief, pg. 4).

As demonstrated in Point I of our main brief, however, the Commission's position in this respect is wholly fallacious and directly contrary to Section 9(b) of the Administrative Procedure Act (5 U.S.C. § 558), entitled *"Imposition of Sanctions"*, which states:

> "A sanction may *not* be imposed . . . except within jurisdiction delegated to the agency *and as authorized by law.*" (Italics supplied)

Congress made it clear from the very beginning of agency operations under the Administrative Procedure Act that the effect of Section 9(b) is *"to confine agencies to the . . . powers" expressly conferred by it, the Congress;* and *"that agencies are not authorized to invent sanctions or relief" (Cong. Record, Vol. 92, Part 5, pg. 5654, 79th Cong., 2nd Session, 5/24/46).*[2] Following Congress' directive, the Supreme Court has unqualifiedly ruled that, *unless the power to impose a sanction is specifically granted to an agency by Congress,* the agency has *no power* to impose the sanction (*Stanard* v. *Olesen,* 74 S. Ct. 768, 771 (1954)). And with reference to the Federal Power Commission itself, the Supreme Court has repeatedly ruled that, absent some clear-cut authority in the statute it administers, the Commission, like all other regulatory agencies, has no right to invent or manufacture sanctions which amount to mere penalties, fines or reparations orders (*Federal Power Commission* v. *Hope Natural Gas' Com-*

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[2] As demonstrated in our main brief, Congress defined the word "sanction" to include *"the imposition of penalties and fines"*, the assessment of *restitution or reimbursement (refund) orders* etc. (5 U.S.C. § 551(10)).

pany, 320 U.S. 591, 618 (1944); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 254, 258 (1951); *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 229 (1965)).

We thus turn now to a brief discussion of the case authorities upon which the Commission relies in its brief to demonstrate that those authorities do not support the Commission's positions in this case in the slightest and that, upon analysis, all show more clearly why the Commission's refund order in this instance is unlawful, arbitrary and unsustainable.

POINT I.

Refund Orders Heretofore Sustained by the Courts Were Not Mere Fines or Penalties Arbitrarily Levied Without Proof of Unreasonableness To Punish an Applicant for Inadvertent Failure To File a Contractual Rate Increase. In Each Instance, Those Past Orders Were Entered, After Proof of Unreasonableness and in Strict Compliance With the Natural Gas Act, To Require the Refund of an Excessive Rate Found by the Commission or the Courts To Be Unjust, Unreasonable or Out-of-Line.

At page 5 of its brief, the Commission relies on *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223 and *Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9, to support its alleged right to enforce the refund order involved in this case. Those decisions, however, in no respect constitute authority for the penalty or fine the Commission has attempted to levy on petitioner here solely because it inadvertently failed to file a rate increase established by the 1956 contract in 1964.[3]

In *Callery Properties*, the Commission issued certificates under Section 7 of the Natural Gas Act in 1958-1959 and

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[3] The Court will undoubtedly note that concededly the 1964 rate increase was contractually fixed and established in 1956, 5 years before the Commission itself asserted any possible jurisdictional authority over applicants such as petitioner.

approved the applicants' gas prices which ranged between 21.4¢ and 23.8¢ per Mcf. *Upon judicial review, the Commission's orders were vacated by the Supreme Court which ruled that the approved prices should be reconsidered by the Commission.* Upon remand, the Commission proceeded to hold lengthy rate hearings and ultimately found the "in-line" price for the South Louisiana area involved to be 20.5¢ per Mcf, and thus refund orders were entered directing the producers in *Callery* to refund the difference between the initially approved rate found to be too high by the Supreme Court and the reduced "in-line" rate established by the Commission after the case was remanded. The producers complained, but the refund orders were approved by the Supreme Court, which ruled, at 382 U.S. 223, 229, 230:

> "While the Commission has no power to make reparation orders, *Federal Power Commission* v. *Hope Natural Gas Company,* 320 U.S. 591, 618, . . . its power to fix rates under § 5 being *prospective only . . . , it is not so restricted where its order, which never became final, has been overturned by a reviewing court. Here, the original certificate orders were subject to judicial review; and judicial review at times results in the return of benefits received under the upset administrative order.*" (Italics supplied)

In other words, *Callery Properties* stands *exclusively* for the proposition that when rates approved by the Commission in a certificate proceeding under Section 7 of the Natural Gas Act *are later vacated upon review in the federal courts and new lower, just rates are thereafter established under the Act,* the Commission may order a refund *because the rate originally approved were never final and binding and same were thereafter expressly found to be unjustly high and contrary to the Natural Gas Act, which requires that such rates be "just and reasonable" or "in line" with established area rates* (See 15 U.S.C. § 717 c). Patently, that holding has no relevance whatsoever to the

case at bar wherein there has been *no* court order vacating rates previously approved by the Commission and wherein there has been *no* ruling, by either the Commission or the courts, that Plaquemines' 1964 rate increase was either unreasonable or out-of-line.

Similarly, in *Federal Power Commission* v. *Sunray DX Oil Co., supra,* the Commission itself, acting pursuant to Section 7 of the Act (15 U.S.C. § 717f(c)), issued *temporary* certificates to several gas producers in which *temporary rates* were summarily established (without hearing) by the Commission itself. Most of the said temporary certificates warned on their face that should the Commission find, after rate hearings, that the temporary rates summarily fixed were too high, then a refund of the excess charge would be ordered (See 391 U.S. 9, 41). The Commission thereafter conducted rate hearings and ultimately established "in line" rates which were *lower* than the temporary rates. Accordingly, as warned, the Commission directed the producers to refund the difference between the summary temporary rates and the "in-line" rates established by the Commission after hearing the evidence. *The Supreme Court noted once more that the Commission has no power whatsoever to impose sanctions or to enter reparations orders* (See 391 U.S. 9, 24), but in light of the facts in *Sunray DX Oil Co.*, the Court concluded, at page 45:

> ". . . we hold that in the exercise of its power to condition permanent certificates under § 7(e), the Commission may require producers *to refund amounts collected under outstanding, unconditioned temporary certificates* IN EXCESS OF THE FINALLY ESTABLISHED IN-LINE PRICE." (Italics supplied)

Obviously, the decision in *Sunray* has no relevance to the case at bar, *except to the extent that, once again, the Supreme Court reiterated, in the course of its opinion, that the Federal Power Commission ordinarily has no statu-*

tory power to impose sanctions in the form of reparations orders (See 391 U.S. 9, 24). The court thus approved the refund there involved solely as an "*exception*" to the last mentioned general rule, i.e. it found that when unlawfully high rates are summarily inserted in temporary certificates under Section 7 of the Act and subsequent hearing procedures establish the *excessiveness* of the rate, then, *and only then,* may a refund be lawfully ordered by the Commission.

Essentially, therefore, both *Callery Properties* and *Sunray DX Oil Company* reaffirm the general rule, which is directly applicable to the case at bar, to wit, *that the Federal Power Commission has no statutory power to impose sanctions in the form of fines, penalties or refund orders* (See 382 U.S. 223, 229, 230; 391 U.S. 9, 24). In *Callery,* the court licensed an *exception* to this general rule *only* because a rate initially approved by the Commission was finally set aside on judicial review and thereafter found to be *excessive* under the Act itself; and in *Sunray,* a second exception was permitted because a temporary summary rate, initially inserted by the Commission in a temporary certificate, was likewise thereafter found to be *excessive* under the Act itself.

Callery and *Sunray,* read togther, thus demonstrate clearly, we submit, why in the case at bar the general rule flatly applies to nullify the refund order the Commission is seeking to impose on Plaquemines. *Here, there is no evidence of any kind and there has been no finding of any nature that the rate increase Plaquemines inadvertently failed to file under Section 4 of the Natural Gas Act (15 U.S.C. § 717c) was excessive in any respect.* Indeed, all of the available evidence in 1971 indicates that the said rate increase, established by a 1956 contract, was *not* excessive and that, had it been filed under the Act, *it would have been approved by the Commission.* In fact, the Commission has affirmatively approved that very same rate as "*warranted*" in 1966, just 21 months after it originally went into effect (Commission's Brief, pg. 4).

POINT II.

The Commission's Ability To Back-Date Certificates Issued Under the Federal Water Power Act So As To Require the Retroactive Payment of Fixed Statutory Taxes or Charges Specifically Prescribed by Congress in That Particular Act Does Not Mean That the Commission May Violate the Administrative Procedure Act in This Case by Inventing Fines or Penalties Not Prescribed by Congress in the Natural Gas Act.

The general rule established by Section 9(b) of the Administrative Procedure Act (5 U.S.C. § 558(b)) is that an agency such as the Federal Power Commission may not impose any sanction or collect any fine or penalty which is not expressly *"authorized by law"*. If the statute administered by an agency *specifically* provides for or requires the collection of some administrative charge, tax or penalty, then obviously the agency has the right and duty to enforce the Congressional directive and to collect the statutory charge, tax or penalty. If, on the other hand, the statute involved does not *specify* or *authorize* the collection of any fine, penalty or refund, then it is equally clear that the agency is powerless "to invent" such a sanction and then seek to enforce its collection.

With this restatement of the general rule of law here applicable, let's examine *Niagra Mohawk Power Corp.* v. *Federal Power Commission,* 379 F. 2d 153, relied on by the Commission at page 6 of its brief.

First of all, *Niagra Mohawk* was decided under the Federal Water Power Act of 1920, as amended, not the Natural Gas Act. The two statutes are distinctly different in regulatory purpose and requirements, as well as statutory content, so a decision under the former is clearly not directly relevant to any actions taken by the Commission under the latter.

Secondly, in *Niagra Mohawk,* the large public utility involved was found to have constructed four extensive hydro-

electric projects in navigable waters of the United States without first obtaining construction licenses from the Commission, albeit it knew or should have known without doubt, that the waters in which it built the projects were navigable and subject to Commission control under the Power Act. Thus, when it finally applied for the necessary construction permits in 1962, the Commission back-dated the licenses and made them effective *nunc pro tunc* as of 1941 and 1949, dates when the license applications should have been filed in the first place. *The back-dating of the licenses is the only action actually taken by the Commission itself.* But, such back-dating automatically made *Niagra Mohawk* subject to those *specific provisions* of the Federal Power Act (16 U.S.C. § 803(d) and (e)) which made all licensees subject to—

> (i) the payment of an annual charge to defray the costs of administration of the Federal Power Act, and
>
> (ii) the establishment, after 20 years of operation, of an amortization reserve account to be created out of excess or surplus earnings and to be used "in the reduction of net investment".

Since all the Commission did in effect was to make *Niagra Mohawk* subject to *the specific statutory provisions* of the Act *itself*, i.e. *the Commission did not "invent" any sanction, fine, penalty, administration charge or refund not expressly provided for in the Act itself,* this Court, properly and correctly we believe, upheld the Commission's authority to "back-date" the license.

In the case at bar, however, the Commission has not "back-dated" a certificate so as to make Plaquemines subject to some *specific administration charge or refund penalty expressly set forth in the Natural Gas Act itself.* On the contrary, the Commission, without "back-dating" or any similar device, has simply proceeded here *"to invent"* a penalty, a sanction, a refund charge of its own for Plaquemines' inadvertant failure to file a single rate

increase in 1964, and the Commission concedes in its brief that there is no provision of the Natural Gas Act itself which specifically prescribes or supports (as does the Federal Power Act in *Niagra Mohawk*) the payment of the refund charge so assessed.

Here, we contend, Section 9(b) of the Administrative Procedure Act comes into play to prohibit the Commission from imposing on Plaquemines a sanction not plainly "authorized by law".

POINT III

The Refund Orders in Jupiter Corp. v. F.P.C. and Shell Oil Co. v. F.P.C. Were, Contrary to the Commission's Specious Contention in Its Brief, Clearly Based on Findings by the Commission That the Rates Involved Were Unjust, Unreasonable or Unjustified. Thus, Both Cases, Cited by the Commission, Actually Demonstrate That Petitioner Cannot Be Legally Required To Comply With a Refund Order Which the Commission Concedes Is Not Based on the Required Statutory Finding of Unjustness and Unreasonableness.

We demonstrated in Point II of our main brief that, under the Natural Gas Act, "All rates . . . shall be *just and reasonable*", and only those rates that are "not just and reasonable" are "*declared to be unlawful*" (Natural Gas Act, Section 4(a), 15 U.S.C. § 717c(a)). This being the statutory test for the lawfulness of rates under the Act, Section 4(e) goes on to provide that the Commission's power to order rate refunds is thus limited to those instances where rates are found by the Commission to be "*not justified*" (Natural Gas Act, Section 4(e), 15 U.S.C. § 717c(e)). Indeed, Section 5 of the Act specifically provides further that the Commission's power to order "*a decrease*" in existing rates is limited to those cases where the Commission itself, after a hearing, finds that the existing rates are "*unjust, unduly discriminatory . . . or are not the lowest reasonable rates*".

Our position in petitioner's main brief, therefore, was that *absent* any finding by the Commission in this case that Plaquemines' 1964 contract rate increase was *"unjust . . . or not the lowest reasonable rate"*, the Commission had *no* statutory authority to order *"a decrease"* in said rate or to insist that any portion of that rate be made the subject of a refund order. This conclusion was buttressed, we contended, by the Commission's announced concession that the said rate, installed in late 1964, was *"warranted"* (i.e. *"just and reasonable"*) as of mid-1966. In other words, we argued it was arbitrary and capricious for the Commission simultaneously to find the said rate "warranted" in mid-1966, *to withhold any ruling on that point with regard to the same rate in November, 1964,* and then to demand, without even attempting to apply the statutory test of *"reasonableness"*, that a portion of the existing rate be refunded for the relatively short period of time which intervened between November, 1964 and mid-1966, such refund being solely a penalty or fine for petitioner's inadvertent failure to file the rate increase in 1964.

The Commission, confronted with this obvious statutory fallacy or shortcoming in its position, suddenly asserts at page 7 of its brief, that *even without any proof or finding of rate unreasonableness,* this Court should still uphold its refund order in this case because of decisions heretofore rendered in *Jupiter Corp.* v. *Federal Power Commission*, 137 U.S. App. D.C. 295, 424 F. 2d 783, cert. denied, 397 U.S. 937 and *Shell Oil Co.* v. *Federal Power Commission,* 334 F. 2d 1002. We respectfully submit, however, that neither of those decisions is applicable to the case at bar and neither constitutes authority for the Commission's asserted position.

In *Jupiter Corp.*, the Commission, adhering to the statutory requirements of the Natural Gas Act referred to hereinabove, instituted an investigation in 1962 "to determine the *just and reasonable rates* to be charged for Jupiter's

transportation of gas from producers to Tennessee Gas Pipeline Company'' (424 F. 2d 785). As a result of that investigation, Jupiter's existing rates to Tennessee were found to be *unreasonable,* and they were substantially reduced. Jupiter thereupon sought to transfer its losses as a result of these transportation rate reductions to Tennessee to the producers from whom it obtained liquid gas condensates for delivery to Tennessee, claiming this was proper under its contracts with the producers. The producers disagreed, but Jupiter proceeded to withhold some of the producers' funds. The Commission thereupon issued declaratory orders rejecting Jupiter's position that it had the right to pass its losses on to the producers under its contracts, but Jupiter defiantly refused to comply with the Commission's decision. Upon motion of one of the producers, the Commission thus entered an ''enforcement order'' which required Jupiter to payover to the producers the monies Jupiter had been illegally withholding since the Commission reduced Jupiter's existing rate to Tennessee for *''unreasonableness''*. Jupiter thereupon sought review of the Commission's enforcement order, but this Court very understandably affirmed same, stating, at page 791:

> '' . . . we think the enforcement order was a permissable step to secure compliance with the rate orders . . . ''

In no respect, therefore, does *Jupiter* stand for the baseless proposition the Commission now seeks to advance in this case, to wit, that the Commission has the right, *without proof of unreasonableness and without a finding of unreasonableness,* to reduce Plaquemines' 1964 rate or to force a refund of a part of that rate solely to penalize Plaquemines for having inadvertently failed to file the said rate. On the contrary, *Jupiter* demonstrates that Jupiter's existing rate was reduceable and made the subject of a refund order only *after* the Commission conducted hearings and expressly found that said rate was

NOT *"just and reasonable"* (424 F. 2d 785). The subsequent "enforcement order" was entered solely to secure compliance with the Commission's prior finding of Jupiter's *rate unreasonableness.* In reality, therefore, *Jupiter* is authority for Plaquemines' position in this case—*not* for the Commission's.

Equally inapposite is the Third Circuit's decision in *Shell Oil Company, supra.* There, Shell Oil, a producer of natural gas, was a party to 13 contracts with El Paso Natural Gas Company for the supply of natural gas. Each contract specified Shell's rates and same were filed with the Power Commission. The said contracts contained so-called "favored nation clauses" which provided for a price increase to Shell if El Paso at any time entered into an agreement with another Seller for the purchase of gas at a price higher than that being paid Shell under existing contracts. In 1958, while the basic contracts were in effect, El Paso agreed to buy gas from West Texas Gathering Company at a price which Shell deemed higher than its contract price. Shall thereupon filed "change of rate" schedules with the Commission, alleging that, by reason of the "favored nation clause" in its El Paso contracts, its rates could be increased. Pursuant to Section 4(e) of the Natural Gas Act, the Commission suspended Shell's rate schedules and set the matter down for hearing to determine whether the proposed rate increases were *just* and *reasonable* i.e. *lawful* (See Natural Gas Act, Section 4(a), 15 U.S.C. § 717c (a)). The hearing procedures were not completed during the statutory suspension period, so Shell's increased rates became effective *subject to the refund of amounts found to be excessive or unjustifiable* (See Natural Gas Act, Section 4(e), 15 U.S.C. § 717c (e)). Thereafter, the Commission ruled that the "favored nation clause" in the Shell-El Paso contracts had not been triggered by El Paso's purchases from West Texas Gathering Company; that Shell's rate increases were thus not properly in effect under the said contracts; that the in-

creased rates were therefore *not just and reasonable* and were *"not justified"* (See 334 F. 2d 1006; Natural Gas Act, Section 4(e), 15 U.S.C. § 717c (e)). Shell was thus ordered, pursuant to Section 4(e) of the Act, to refund the excessive charges it had collected subject to the statutory refund procedure, and, of course, the Commission's order was sustained under the Act by the Third Circuit.

Patently, therefore, *Shell Oil*, like *Jupiter*, actually is an authority to support Plaquemines' position in the case at bar—not the Commission's. In Shell Oil, the refund order was entered under Section 4(e) only after the Commission conducted a hearing and expressly found, *as the Act requires*, that Shell's rate increase was *unreasonable* and *not justified*. The Commission, contrary to its brief in the case at bar, did *not* order the refund in *Shell Oil* without first proceeding to determine and hold that Shell's increased rate was unreasonable, and thus unlawful, under the Act.

In conclusion, therefore, we urge the Court to reject the specious contention advanced for the very first time by the Commission in its brief in this case and to rule that Plaquemines cannot be compelled to comply with a refund order which was concededly entered entirely without any evidence or finding of rate unreasonableness as required by the governing statute.

POINT IV

The Commission's Brief Completely Misrepresents the Legal Situation Which Existed Regarding the Commission's Jurisdiction Over Intrastate Operators Such as Plaquemines at the Time Plaquemines' Rate Was Increased in 1964, Pursuant to the 1956 Contract. In 1964, Prior to the Supreme Court's Decision in Lo Vaca, the Prevailing Law Was That the Commission Had No Jurisdiction Whatsoever.

It must be obvious from the preceding portions of this brief that petitioner is convinced the Commission has been less than fair and candid in the positions it has taken

before this Court. That impression is correct; and as further evidence of the reasons for petitioner's belief, we urge the Court, in justice, carefully to review the *true situation* which existed in 1964, when Plaquemines' rate increase took effect pursuant to the 1956 contract, regarding the Commission's *complete lack of jurisdiction over intrastate operators such as Plaquemines,* as compared to the position the Commission now takes on this subject at pages 12, 13 of its brief.

It is a plain distortion of fact and law for the Commission to contend that, when it rendered its decision in Lo-Vaca in 1961, all *intrastate* operators such as Plaquemines were *automatically* put on notice that henceforth they and all of them were subject to the Commission's jurisdiction. The *true facts* are as follows: In 1955, *before Plaquemines entered into its 1956 contract with Tennessee,* the Commission itself persistently ruled that it had *no* jurisdiction over "contracts which were clearly *intrastate* in nature" (See *State of North Dakota* v. *Federal Power Commission,* CCA, 8, 1957, 247 F. 2d 173, 175). The Commission's position that it had *"no jurisdiction over intrastate operations"* was carried to the Eighth Circuit Court of Appeals, which ruled, in 1957 (*State of North Dakota* v. *Federal Power Commission, supra,* at page 177):

> "That the Act does *not* embrace intrastate commerce is clear from the Act itself and from judicial interpretations thereof. *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 10 Cir., 1944, 142 F. 2d 943, 958, aff'd in *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 1945, 324 U.S. 581, 585, 588 . . . ; *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana,* 1947, 332 U.S. 507, 516, 517, . . . ; *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission,* 1951, 341 U.S. 329, 334 . . . . See *State Corp. Commission of Kansas* v. *Federal Power Commission,* 8 Cir., 1953, 206 F. 2d 690, 707, cert. denied, 346 U.S. 922, ...

"That gas pipeline companies can be engaged in both intrastate as well as interstate business and have the intrastate portion not subject to FPC jurisdiction is illustrated by *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 1945, 324 U.S. 581, 585."

The Eighth Circuit thus concluded, at page 178:

"It is our conclusion that the petitioners cannot prevail here. The transactions in question covered gas produced, transported, sold and consumed entirely within the State of North Dakota. They do not constitute interstate commerce in any sense of the word. *The FPC has properly refused to accept jurisdiction over what is purely intrastate commerce.* While the court recognizes the petitioner's proper concern for the interests of North Dakota natural gas consumers in the newly developing market area, *the conclusion is inescapable that the jurisdiction rests not with the FPC but with petitioners themselves.* (Italics supplied)

In the course of its opinion in *North Dakota, supra,* the Eighth Circuit stated that its ruling was wholly in accord with a prior decision rendered by this Court. The Eighth Circuit stated, at pages 177, 178:

The Court of Appeals for the District of Columbia had before it a somewhat similar problem in *City of Hastings, Nebraska* v. *Federal Power Commission,* 1954, 95 U.S. App. D.C. 158, 221 F. 2d 31, cert denied 349 U.S. 920 . . . The FPC there had disclaimed jurisdiction over that part of gas delivered to a local distributor of gas and electricity which was used in its own power plant boilers (direct sale, not for resale). There, of course, the gas was indistinguishably commingled with gas received through the same pipeline and metering facilities for resale but was separately metered only when it reached the power plant through the local distribution system of the wholesale customer. *The Court held that the Natural Gas Act did not apply to the direct sales for use or consumption of the purchaser, even though it had been so commingled, thus sustaining the FPC's denial of jurisdiction."* (Italics supplied)

Thus, at the time the Commission reversed its own historical position of no jurisdiction over intrastate operations" in 1961, *the law, as theretofore settled by the Supreme Court and the Courts of Appeals, was directly contrary to this administrative action.* It was not surprising therefore, that when the Commission's Presiding Examiner rendered his initial decision in *Lo Vaca Gathering Company, supra,* he concluded in August, 1961 that *the Commission had no jurisdiction over the intrastate operations there proposed* (See Commission's decision in *Lo Vaca Gathering Company* and *Houston Pipe Line Company,* 26 FPC 606 (1961)). It was likewise not surprising that the majority of the Commissioners themselves thereafter had serious difficulty in October, 1961 justifying their position in *Lo Vaca* in light of *North Dakota, supra* and the long line of contrary judicial authorities hereinabove referred to.

Nor was it surprising that Commissioner O'Connor, *the Commissioner who wrote the Commission's three opinions in the case at bar and who issued the refund order now before this Court,* strenuously dissented from the Commission's majority opinion in *Lo Vaca* (See Dissenting Opinion, *Lo Vaca Gathering Company,* Appendix A hereto). In his dissent, Commissioner O'Connor stated:

> "In modifying the Presiding Examiner's decision, the majority recognizes that its opinion and order are inconsistent with *State of North Dakota et al* v. *F. P. C.,* 247 F. 2d 173 (CA 8, 1957) . . .
>
> "In that case, as in the Presiding Examiner's decision herein, *the metering off within the producing state of the contract quantities of intrastate gas before any of the gas stream had crossed a state line was held to be a clearly distinguishable separation despite the commingling thereof in said stream with other locally produced gas destined for interstate transportation and sale* . . .
>
> "In my opinion, the decision of the majority would effectively preclude the use of interstate pipeline com-

pany facilities for intrastate transmission of natural gas within the producer states for the use of the consumers and industries in those states without the producers of such gas being subject to the jurisdiction of the Federal Power Commission. It seems to me this is an unnecessarily harsh imposition on the consumers in the producing states whose resources and statutes have been availed of to permit the construction and operation of these interstate lines. *There may be good and sufficient reasons (not the least of which is the cost of complying with regulatory reporting requirements) for many producers to avoid subjecting themselves to the jurisdiction of the Federal Power Commission".* (Italics Supplied)

In essence, therefore, we find Commissioner O'Connor, who issued the refund order in this case to punish Plaquemines for not filing its 1964 rate increase under the 1956 contract before the Supreme Court rendered its decision in *Lo Vaca,* in the anomalous position of having suggested, in his own 1961 dissenting opinion in *Lo Vaca,* that *"There may be good and sufficient reasons . . . for many producers to avoid subjecting themselves to the jurisdiction of the Federal Power Commission."*

In any event, as we explained in Point III of our main brief, when *Lo Vaca* reached the Fifth Circuit Court of Appeals for review, that court, relying on *North Dakota, supra,* and the other judicial authorities mentioned above, *flatly vacated the Commission's 1961 order in Lo Vaca and thus joined Commissioner O'Connor in holding that intrastate operations such as Plaquemines' here are not subject to the jurisdiction of the Federal Power Commission* (See *Lo Vaca Gathering Company* v. *Federal Power Commission,* CCA 5, 1963, 323 F. 2d 190).

Hence, as demonstrated in our main brief, when Plaquemines' rate increase became effective under the 1956 contract on *November 1, 1964,* the prevailing law was that of *North Dakota, supra,* and that of the Fifth Circuit in *Lo Vaca.* Accordingly, as of that date, and until the Su-

preme Court thereafter rendered its decision in *Lo Vaca, Plaquemines was entirely justified in its failure to file the said 1964 rate increase.* Indeed, its failure to file, based on the prevailing view that the Commission had no jurisdiction over intrastate operations, *was wholly lawful and proper.*

Ergo, that failure to file in no manner can be utilized by the Commission as a basis for its arbitrary, capricious refund order in this case. In fact, as the Supreme Court stated in *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 229, 230, a decision heavily relied upon by the Commission in the case at bar, an administrative decision by the Federal Power Commission is never final until after judicial review because, in the process of judicial review, that decision is subject to change or complete rejection by the reviewing courts. Thus, there is no validity whatsoever to the Commission's claim that just because it rendered its initial decision in 1961, Plaquemines was automatically obligated to file, albeit the Commission's administrative ruling was directly contrary to prevailing law established by the Supreme Court and the Courts of Appeals. *Plaquemines, of course, was not a party to Lo Vaca. The Commission's decision in that case was in no respect binding on Plaquemines.* But, of even greater importance, is the fact that the Commission's administrative ruling in *Lo Vaca* was thereafter *totally reversed and vacated* by the Fifth Circuit Court of Appeals. So, when the time for the 1964 filing arrived, there was no Commission decision in effect—it had been vacated by the Fifth Circuit.[4]

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[4] At page 12 of its brief, the Commission refers to *Hugoton Production Co.*, 41 F.P.C. 490, a 1969 decision rendered *by the Commission itself*, as authority for its claim "that its *Lo Vaca* decision put companies such as Plaquemines on notice that their sales *might* be jurisdictional". But, even that one authority is *not* yet a final decision. As the Commission concedes at page 9 of its brief, *Hugoton* is now under review in the Fifth Circuit (CCA 5 No. 28229 (1970)). Noteworthy, of course, is the Commission's concession that, *at best*, its 1961 decision in *Lo Vaca* was notice that *intrastate* sales "*might* be jurisdictional"—i.e., the Commission's 1961 decision did not settle the matter even in the Commission's mind.

Patently, Plaquemines proceeded lawfully and properly in 1964 and it must not be arbitrarily penalized for having done so. The Commission's proposed penalty clearly, therefore, must be vacated and set aside.

CONCLUSION

There is nothing even remotely suggested in the Natural Gas Act to support the Commission's position, at pages 14, 15 of its brief, that under circumstances such as those here presented, Plaquemines should be forced to borrow funds to pay an arbitrary, capricious penalty admittedly "invented" by the Commission; or that Plaquemines should apply all of its available cash to the *partial payment* of such a refund; or that Plaquemines, which suffered heavy losses in its business operations in 1967 and (with its affiliate), a loss of $225,000 in the 1969 hurricane, should now be saddled with interest-bearing installment payments aimed at reducing the said illegal refund over a long period of years. The Commission itself should recognize that such *"manufactured sanctions"* would serve no useful, lawful purpose under the Act, but it has stubbornly refused to do. Accordingly, we submit that, in justice, the Commission's order in this instance must be rejected and vacated by the Court.

Respectfully submitted,

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APPENDIX

Lo-Vaca Gathering Company
Houston Pipe Line Company
Docket No. CI60-693
Docket No. CP61-177
(October 23, 1961)

O'Connor, Commissioner, *dissenting in part:*

Since, in my opinion, the Presiding Examiner's decision should be adopted by the Commission as its decision herein, I dissent from the modification thereof.

In modifying the Presiding Examiner's decision, the majority recognizes that its opinion and order are inconsistent with *State of North Dakota, et al.* v. *F.P.C., et al.*, 247 F.2d 173 (CA8-1957). Their opinion states that:

> "To the extent that the *North Dakota* case may be inconsistent with the action which we take in the instant case, we believe that it was erroneously decided."

The Court of Appeals stated the basis of its *North Dakota* decision as follows (p. 177):

> "... As found by the Examiner and approved by the FPC, the gas received ... at Tioga, North Dakota, is broken into two streams, one of which moves eastward in the Tioga-Minot, North Dakota, intrastate line. Clearly that is and can only be intrastate transportation not subject to FPC control. The other stream moves westward [into Montana-Dakota's integrated system, p. 175] but *before crossing any state line* a small portion of it goes off into the laterals serving the four North Dakota towns of Ray, Wheelock, Epping and Springbrook. The gas going into the Tioga-Minot intrastate line and to the four named North Dakota towns is *bought and paid for under the 'firm gas' contracts.* We think, then, the gas sold pursuant to such 'firm gas' contracts for consumption in North Dakota

> is clearly distinguishable from the 'dump gas' sold in interstate commerce. There is no commingling of interstate with intrastate gas within the State of North Dakota *in the sense of loss of identity because the intrastate gas going to the four North Dakota communities named is separated from the gas stream in the main line and metered before any portion of the gas stream has left the State of North Dakota.* Accordingly, the *quantities* of intrastate gas purchased by Montana-Dakota under the 'firm gas' contracts are easily identifiable and determinable." (Emphasis supplied.)

In that case, as in the Presiding Examiner's decision herein, the metering off within the producing state of the contract quantities of intrastate gas before any of the gas stream had crossed a state line was held to be a clearly distinguishable separation despite the commingling thereof in said stream with other locally produced gas destined for interstate transportation and sale.

As to such commingling, the Court said in *North Dakota,* (p. 176):

> ". . . The fact that this ['firm'] gas travels over the Tioga-Williston line in one stream, along with the gas purchased under the 9¢ 'dump gas' interstate contracts does not convert the 16¢ 'firm gas' contracts into interstate contracts."

Obviously, under the physical flow theory applied by the majority herein, some molecules of the 'firm gas' in the stream in the *North Dakota* case flowed into Montana for resale and the 'firm gas' contracts thus could not have been held to be outside our jurisdiction. Hence, the necessity for them to depart herein from the judicial precedent established by the *North Dakota* case. To such a departure, I am opposed.

I agree with the majority that the expense of gas purchased for compressor use by interstate pipeline companies, as well as all other expenses of these companies, should be subject to our review and possible disallowance for ratemaking. However, I do not feel that the necessity for such review of these relatively small amounts of gas requirements is sufficient cause for the development of such a broad policy as that enunciated by the majority in this case.

In my opinion, the decision of the majority would effectively preclude the use of interstate pipeline company facilities for intrastate transmission of natural gas within the producer states for the use of the consumers and industries in those states without the producers of such gas being subject to the jurisdiction of the Federal Power Commission. It seems to me this is an unnecessarily harsh imposition on the consumers in the producing states whose resources and statutes have been availed of to permit the construction and operation of these interstate lines. There may be good and sufficient reasons (not the least of which is the cost of complying with regulatory reporting requirements) for many producers to avoid subjecting themselves to the jurisdiction of the Federal Power Commission.

It appears to me that the advantages to interstate pipeline companies of the flexibility in disposing of surplus supplies of gas in intrastate commerce, as well as the potential usefulness of these lines in providing intrastate transportation revenues, far outweigh the possibilities of additional costs to interstate consumers.

L. J. O'Connor, Jr., Commissioner